Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A KIRBY ENGINEERING, MMI GENERAL INSURANCE, LTD.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether a cargo owner that contracts with a freight-forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation.

2. Whether federal maritime law requires that terms of a bill of lading extending liability limitations under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-1315, to "independent contractors" used to perform the contract of transportation must be narrowly construed to cover only those independent contractors in privity of contract with the bill's issuer.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that its parent corporation is the Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of petitioner's stock.

All parties to the proceeding are listed in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Norfolk Southern Railway Company ("Norfolk Southern") respectfully requests that this Court grant its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 300 F.3d 1300 (11th Cir. 2002) and appears in the Appendix of this Petition ("Pet. App.") at 1a-20a. The court of appeals' unpublished order denying the petition for rehearing *en banc* appears at Pet. App. 39a-40a. The district court's memorandum opinion and order granting partial summary judgment on behalf of Norfolk Southern is unpublished and appears at Pet. App. 27a-38a. The district court's order certifying an appeal to the court of appeals pursuant to 28 U.S.C. § 1292(b) appears at Pet. App. 21a-26a.

JURISDICTION

The court of appeals entered judgment on August 8, 2002, and denied a timely petition for rehearing on October 7, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF STATUTORY AND OTHER FEDERAL LAW

The Carriage of Goods by Sea Act, known as COGSA, ch. 229, 49 Stat. 1207 (1936), is codified at 46 U.S.C. app. §§ 1300-1315 and is reproduced at Pet. App. 41a-53a. Federal maritime law governs the contractual extension of liability limitations under COGSA in bills of lading. See *Wemhoener Pressen* v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (4th Cir. 1993).

STATEMENT OF THE CASE

This case presents two important questions of federal maritime law that have divided the lower courts. First, the Eleventh Circuit, in conflict with precedents of multiple courts of appeals and of this Court, has ruled that a freight forwarder that contracts with a cargo owner as a carrier is not the agent of the owner in contracting with vessel carriers to provide the actual transportation of the goods. Thus, under the decision below, the cargo owner is not bound by the terms of the bill of lading that the vessel carrier issues to the freight forwarder. The remarkable and unprecedented holding that the vessel carrier's bill of lading is unenforceable against the cargo owner not only destroys predictability and settled expectations in international trade, but it also eviscerates the mandatory federal statutory definition of a vessel carrier's rights, duties, liabilities and immunities under COGSA, which are only operative as compulsory terms of the bill of lading.

Second, in construing relational terms like "independent contractors" in the "Himalaya clause" of a bill of lading that extends COGSA's liability limitations to other parties whose services are used to perform the contract of transportation, the Eleventh Circuit has joined the Second Circuit in holding that "[i]n this Circuit . . . the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." Pet. App. 13a-14a. These circuits are in direct and acknowledged conflict with the Ninth Circuit, which "rejects the [cargo owner's] argument that privity of contract is required in order to benefit from a Himalaya Clause." *Akiyama Corp. of Am.* v. *M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (9th Cir. 1998). Review is particularly critical because the bill of lading at issue here is the standard form used by freight forwarders worldwide for multimodal international transportation, which commonly involves downstream carriers and other independent contractors who lack the privity required by the court below.

Conflicts among the major maritime circuits on such critical issues are inherently untenable, and even more so when the decision below frustrates reliance interests of carriers in international trade. The very purpose of COGSA, and of the Himalaya clauses that are ubiquitous in the international transportation of goods, is to establish certainty as to the potential liability of carriers *ex ante*. In practice, carriers set their rates and transact business based on the assumption that their liability is strictly limited under COGSA. Rather than opt out of this limitation by declaring the actual value of the goods and paying a higher rate, shippers (like respondent James N. Kirby, Pty Ltd. ("Kirby")) almost universally accept the lower rate and turn to insurance to cover potential damage or loss of goods in transit. The insurer (like respondent MMI General Insurance Limited ("MMI")) in turn charges premiums to compensate it for the risk of full liability beyond the COGSA limit. Respondents have sought to undo the bargain that they struck. By ruling in favor of respondents, the Eleventh Circuit deviated from the carefully calibrated liability scheme of COGSA and gave those parties a wholly unwarranted windfall at the expense of carriers. This Court should grant review to resolve the conflicts of authority and to protect the reliance interests that have developed under the COGSA regime.[1]

Statutory Background

COGSA "is the central statute in commercial admiralty, governing over $200 billion worth of American foreign commerce annually." Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5) (Part*

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[1] Conflicts on issues of maritime law are particularly problematic because "litigants can easily exploit them through forum shopping": a plaintiff may sue in rem wherever a vessel is located or in personam wherever process may be served on the defendant or the defendant's property may be attached. *See* Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 Tex. L. Rev. 1251, 1268 (1989) ("*Observations*"). *See infra* at 29.

I), 19 J. Mar. L. & Com. 1, 2 (1988). Congress enacted the statute in 1936 to supplement the 1893 Harter Act, ch. 105, 27 Stat. 445 (codified as amended at 46 U.S.C. app. § 190-196), which limited the liability of vessels and carriers in maritime commerce. Congress based COGSA in large part on the Hague Rules, born of an international convention, whose drafters "sought to allocate risks between carriers and cargo interests under clear, predictable rules that would be simple to apply in commerce." Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5) (Part II)*, 19 J. Mar. L. & Com. 157, 161 (1988) ("*Part II*"); accord *Robert C. Herd & Co.* v. *Krawill Mach. Corp.*, 359 U.S. 297, 301 (1959) (detailing history leading up to COGSA and noting that the Hague Rules were intended "to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers . . . in international trade").

COGSA provides that "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade shall have effect subject to the provisions of this chapter." 46 U.S.C. app. § 1300. Sections 2 through 4 of COGSA, *id.* §§ 1302-1304, set forth the duties, rights, liabilities and immunities of the ship and the carrier as "compulsory terms" of the bill of lading. G. Gilmore & C. Black, Jr., *The Law of Admiralty* § 3-38, at 172 (2d ed. 1975). In particular, section 4(5) of COGSA limits the liability of carriers operating in international shipping by providing that "[n]either the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States." 46 U.S.C. app. § 1304(5). This rule applies "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." *Id.* Section 4(5) thus protects shippers by setting a floor of $500 per package or unit below which carriers may not reduce their maximum

liability, but "cast[s] upon the shipper the burden of declaring the nature and value of the goods, and paying a higher tariff, if necessary, if he wishe[s] to impose a higher liability upon the carrier." *Standard Electrica, S.A.* v. *Hamburg Sudamerikanische Dampfschifffahrts-Gelsellschaft*, 375 F.2d 943, 945 (2d Cir. 1967).

COGSA's liability limitations directly apply only to a ship or "carrier," defined as "the owner or the charterer who enters into a contract of carriage with a shipper," and only during the period from "when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. app. § 1301(a), (e). Nonetheless, COGSA specifically contemplates that shippers and carriers may make agreements governing responsibility and liability "prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea." *Id.* § 1307. Federal maritime law further permits "Himalaya clauses" extending COGSA liability limitations to persons other than the carrier. See *Robert C. Herd & Co.*, 359 U.S. at 302-03; *SPM Corp.* v. *M/V Ming Moon*, 965 F.2d 1297, 1305 (3d Cir. 1992); *Generali* v. *D'Amico*, 766 F.2d 485, 487-88 (11th Cir. 1985); *Secrest Mach. Corp.* v. *S.S. Tiber*, 450 F.2d 285, 286-87 (5th Cir. 1971).[2]

Factual Background

Respondent Kirby, an Australian firm that manufactures machinery, wished to ship ten containers of machinery to the General Motors plant in Huntsville, Alabama. Kirby contracted with International Cargo Control Pty Ltd. ("ICC"), an Australian freight forwarder, which is "a company that arranges for, coordinates, and facilitates cargo transport," but does not actually transport the goods in question. Pet. App.

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[2] As the court below noted, "Himalaya clauses take their name from an English case which involved a vessel called the HIMALAYA." Pet. App. 2a n.1.

3a. The parties memorialized their agreement in a bill of lading issued to Kirby by ICC.

The ICC bill of lading used the standard form developed by International Federation of Freight Forwarders Association ("FIATA"): the FIATA Multimodal Transport Bill of Lading, commonly referred to as the "FBL." Pet. App. 8a. The importance of the FBL to international shipping transactions of the kind here at issue cannot be overstated. The FBL is "the world's most frequently used combined transport document," Peter Jonès, *FIATA Legal Handbook on Forwarding* 30 (2d ed. 1993), and has been declared "the most important document used in freight forwarding." Jan Ramberg, *The Law of Freight Forwarding and the 1992 FIATA Multimodal Transport Bill of Lading* 5 (1993) (quoting FIATA's President).

The FBL for the shipment in issue identifies Kirby as the consignor of the goods, and designates the Queensland Star (operated by the carrier Hamburg Sudamerikanische Dampfschifahrts-Geseilschaft Eggert & Amsink ("Hamburg Sud")) as the ocean vessel to carry the cargo from Sydney, Australia to Savannah, Georgia. Pet. App. 65a. This FBL is a through bill of lading that denominates Huntsville, Alabama (inland from Savannah) as the ultimate destination for the goods. See *id.* The FBL attaches and incorporates the standard FBL conditions. See *id.* at 54a-60a, 67a; cf. Ramberg, *supra*, at App. I, at 80-82. Under this bill of lading, ICC is the "Freight Forwarder," defined as the "Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier." Pet. App. 54a (ICC bill "Definitions"). The contract specifically contemplates that ICC may engage other carriers to perform the contract: "By issuance of the FBL the Freight Forwarder a) undertakes to perform *and/or . . . procure the performance of the entire transport*, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the

place of delivery designated in this FBL [and] b) assumes liability as set out in these conditions." *Id.* at 54a-55a (ICC bill ¶ 2.1) (emphasis added). The FBL further provides that, subject to other conditions in the bill, the Freight Forwarder "shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or *any other person of whose services he makes use for the performance of the contract evidenced by this FBL*, as if such acts and omissions were his own" in any "period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery." *Id.* at 55a, 56a (ICC bill ¶¶ 2.2, 6.1) (emphasis added).

The FBL contains a Clause Paramount, which (with exceptions) designates the defenses and limitations of liability set forth in COGSA to govern ICC's potential liability to Kirby should the goods become damaged during transport. Pet. App. 57a-59a (ICC bill ¶¶ 7.3, 8).[3] Pursuant to this clause, Kirby agreed that in the event of damage to the goods, ICC's liability would be limited to $500 per container unless Kirby declared a higher value for its machinery and paid a correspondingly higher freight rate. As most shippers do, Kirby elected not to designate a higher value for its goods and instead turned to an insurer, MMI, to cover the shipment.

The FBL also contains a Himalaya clause. The Himalaya clause extends the COGSA liability limitation to others used by ICC to perform any of its obligations, including independent contractors:

> These conditions apply whenever claims relating to the performance of the contract evidenced by this [bill of lading] are made against any servant, agent or other person (including any independent contractor) whose

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[3] A Clause Paramount, or "period of responsibility" clause, extends COGSA coverage beyond the "tackle to tackle" limitation embedded in the statute's definition of "carriage of goods." *See* 46 U.S.C. app. § 1301(e); *accord id.* § 1307 (authorizing extensions of COGSA).

> services have been used in order to perform the contract, whether such claims are founded in contract or in tort, and the aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in [the Clause Paramount].

Pet. App. 59a (ICC bill ¶ 10.1).

The next clause of the FBL is equally significant in setting out the rights and responsibilities of those who would play a role in the shipment of Kirby's goods. That clause, 10.2, recognizes that "[i]n entering into this contract . . . , the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract." Pet. App. 59a-60a (ICC bill ¶ 10.2); Ramberg, *supra*, at 67. Thus, by its very terms, the FBL purported to make all subcontractors "used in order to perform the contract" parties to the ICC contract of carriage. See Pet. App. 59a; Ramburg, *supra*, at 66.

Because it was not in the business of actually transporting goods, ICC subcontracted with Hamburg Sud, an ocean carrier based in Germany, for the carriage of the machinery from Sydney to Huntsville. As is typical in such transactions, Hamburg Sud issued it own bill of lading (the "Hamburg Sud bill") to ICC, which was named as the "shipper/exporter." Like the ICC FBL, the Hamburg Sud bill similarly identified the Queensland Star as the vessel, Sydney as the port of loading, Savannah as the port of delivery, and Huntsville as the destination of the machinery. Pet. App. 66a. The Hamburg Sud bill imposes numerous obligations (including liability for payment and performance) upon the "Merchant," defined broadly to include "the shipper, consignee, receiver, holder of this Bill of Lading, *owner of the cargo* or person entitled to the possession of the cargo and the servants and agents of any of these." *Id.* at 61a (Definitions (e)) (emphasis added). The bill obligates Hamburg Sud to provide through transportation to the inland destination, "which may well involve transport by rail," and authorizes the carrier to "sub-contract on any terms the whole or any part of the carriage" of the goods. *Id.* at 61a, 62a (Hamburg Sud bill §§ 4, 5a).

The Hamburg Sud bill of lading likewise contained a Clause Paramount, limiting Hamburg Sud's liability under the agreement to $500 per container, absent declaration by ICC of a greater value for the goods (a declaration that ICC, following the course chosen by Kirby, did not make). Finally, the Hamburg Sud bill of lading included its own Himalaya clause, which extended the liability limitations to additional parties that would be used to carry out the contract of carriage:

> [A]ll exemptions, limitations of, and exonerations from liability provided by law or by the Terms and Conditions hereof shall be available to all agents, servants, employees, representatives, all participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever . . . .

Pet. App. 63a (Hamburg Sud bill ¶ 5(b)).

Hamburg Sud transported the machinery from Sydney to Savannah, Georgia on one of its ships. At Savannah, the containers were transferred to petitioner Norfolk Southern, which had been hired by the American arm of Hamburg Sud to transport the goods via train to their final destination in Huntsville, Alabama. The train carrying the containers derailed, allegedly causing $1.5 million in damage to the machinery. Kirby was thereafter reimbursed for its loss by its insurer, MMI.

Kirby and MMI filed suit against Norfolk Southern in the United States District Court for the Northern District of Georgia, bringing claims sounding in negligence and breach of contract for the full amount of the damage caused to its machinery by the derailment. Norfolk Southern moved for

partial summary judgment on the basis that its liability, if any, was no greater than the $500 per package COGSA limitation. The district court granted the motion, concluding that the Himalaya clause in the Hamburg Sud bill of lading, which by its terms encompassed "inland carriers," covered Norfolk Southern and limited the railroad's potential liability to Kirby to $500 per container. See Pet. App. 36a-37a. The district court rejected the plaintiffs' argument that Kirby could not be bound to the agreement entered into by ICC with Hamburg Sud: "One who contracts with others to make arrangements for the transportation of his goods is bound by the terms of the contract entered into on his behalf." *Id.* at 37a (citing *Great No. Ry.* v. *O'Connor*, 232 U.S. 508 (1914)). In reaching its holding, the district court emphasized that the Hamburg Sud bill was a "'through bill'" covering transport of Kirby's goods through to Huntsville. See *id.* at 35a. Further, the court rejected plaintiffs' argument that Norfolk Southern was too far removed contractually from the shipper to enjoy the protections set forth in the Hamburg Sud bill of lading. See *id.* at 34a-35a. Finally, as part of its holding, the district court also found plaintiffs' state law claims to be preempted by the COGSA regime. See *id.* at 37a.

The parties jointly requested that the case be certified for interlocutory appeal because of the existence of a conflict among the circuits on the question whether a subcontractor must be in privity with the issuer of the relevant bill of lading in order to enjoy its liability protections. The district court granted their request and certified the case to the Eleventh Circuit pursuant to 28 U.S.C. § 1292(b), and that court granted review. Pet. App. 25a, 6a.

Decision of the Court of Appeals

A divided panel of the Eleventh Circuit reversed. Pet. App. 2a. The court first addressed the question whether Kirby was bound by the Hamburg Sud bill of lading, which extended the COGSA liability limitation in its Himalaya clause to "inland carriers" used to transport Kirby's machinery. The court did

not dispute that Norfolk Southern was covered by the plain terms of the Hamburg Sud bill's Himalaya clause. See *id.* at 6a. The court of appeals held, however, that Kirby would only be bound by the Hamburg Sud bill if ICC was acting as Kirby's agent when it received the bill. See *id.* at 7a. Noting that "freight forwarders 'may act as agents or as principals, depending on the facts,'" *id.*, the court drew a distinction between situations in which the forwarder merely arranges for a contract between the cargo owner and ocean carrier, but does not enter into any contract of carriage itself, and those in which the forwarder issues its own bill of lading to the cargo owner and collects payment on the same. In the latter case, where the forwarder contracts on its own for transport of the cargo, it held, the forwarder acts not as an agent of the cargo owner, but as its own principal. In the Eleventh Circuit's view, "[i]f ICC had been acting as Kirby's agent, there would have been only one bill of lading, issued by Hamburg Sud to Kirby and listing Kirby as the shipper." *Id.* at 7a-8a.

The court of appeals next held that Norfolk Southern was not protected by the Himalaya clause in the ICC FBL because "the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." Pet. App. 14a. The court held that in the absence of such privity, as here (Norfolk Southern having not contracted directly with ICC), the downstream carrier may not enjoy the protections of the Himalaya clause. See *id.* at 13a. The Eleventh Circuit expressly recognized that on this question it was parting company with the Ninth Circuit, which has rejected the contention that privity of contract is required in order to benefit from a Himalaya clause. See *id.* The Ninth Circuit test instead focuses on "'the nature of the services performed [by the defendant who seeks to invoke the clause] compared to the carrier's responsibility under the carriage contract,'" *id.* (quoting *Akiyama Corp.*, 162 F.3d at 574 (alterations in original)), a test that would dictate a different outcome here.

Judge Siler dissented on both issues. First, he noted that the "bill of lading between Kirby and ICC put Kirby on notice that ICC would have to employ other entities to transport the freight." Pet. App. 19a. It was of no moment, Judge Siler observed, that two different bills of lading governed the relevant cargo, for Kirby had "declined the opportunity to obtain full liability coverage" in its contract with ICC and elected instead to agree to the COGSA limitation incorporated therein and insure its cargo elsewhere. *Id.* Judge Siler ultimately concluded that because Kirby fully expected and knew that ICC would contract with other carriers to ship the cargo, ICC could only have been acting as agent for Kirby in making those arrangements. See *id.*

Second, Judge Siler concluded that Norfolk Southern should in any event enjoy the protections of the Himalaya clause in the ICC bill of lading, which covers "independent contractors" without qualification. Noting again that "Kirby knew that an inland carrier would have to be used" in order to transport the goods to Huntsville, the dissent opined that Kirby must have "agreed to a limitation of liability for the carrier" that would accomplish the last leg of the journey. Pet. App. 19a. That sufficed to bring Norfolk Southern within the scope of the clause. Embracing what he viewed as the better rule of the Ninth Circuit, Judge Siler saw the majority's holding as giving a "windfall" to Kirby's insurer based on a "technicality," all the while ignoring both that "Kirby knew from the start that the ultimate destination would have to be through an inland carrier" and it "agreed to the limitation of liability on the part of ICC and all of its sub-contractors." *Id.* at 20a.

REASONS FOR GRANTING THE PETITION

Review by this Court of the decision of the Eleventh Circuit is necessary to ensure the proper and uniform resolution of two important questions regarding carrier liability in international shipping transactions. In conflict with the

precedents of multiple courts of appeals and of this Court, and with what is understood as the "commercial norm" in this context, the Eleventh Circuit below held that a freight forwarder does not act as agent on behalf of a cargo owner when it arranges transport of the cargo. Its decision disrupts the carefully calibrated liability regime set forth in COGSA and will create extraordinary inefficiencies by placing upon carriers the burden of contracting for COGSA's liability limitations with every party holding a conceivable interest in the goods being transported.

This case also squarely presents the controversy whether privity of contract is necessary to enjoy the protections of a Himalaya clause in a bill of lading that otherwise purports to extend liability limitations to downstream carriers or other subcontractors. On this question, the Eleventh Circuit's decision deepens a split among the maritime circuits and, if permitted to stand, will allow a cargo owner, who agreed to the liability limitation in question and whose expectations did not turn on the identity of those carriers that actually transport its cargo, to obtain a windfall at the hands of a carrier that believed itself to be secure against just such a judgment.

In short, if left unreviewed, the decision below will have a dramatic effect on international shipping agreements and import considerable uncertainty into the allocation of risk in such agreements. The result – checkerboard liability schemes that COGSA and Himalaya clauses are supposed to obviate – will likewise lead to forum shopping and over-insurance by parties to shipping transactions. The Court should grant certiorari to resolve these conflicts among the circuits and reject the Eleventh Circuit's position on each question.

I. THIS COURT SHOULD RESOLVE THE CONFLICT OVER WHETHER A FREIGHT FORWARDER THAT CONTRACTS WITH A CARGO OWNER TO TRANSPORT GOODS IS THE OWNER'S AGENT IN CONTRACTING WITH VESSEL CARRIERS.

The decision of the court of appeals creates a conflict of authority among three of the primary circuits with maritime jurisdiction on the recurring issue of whether a freight forwarder, hired to provide international transportation of cargo, acts as an agent on behalf of the cargo owner when it enters into contracts of carriage with vessel carriers, thereby binding the cargo owner to the terms of that contract. The Eleventh Circuit's decision disrupts the settled expectations of carriers and strips them of the very protections COGSA and Himalaya clauses were designed to give them.

a. On one side of the legal divide are those courts of appeals that, in conflict with the Eleventh Circuit, hold the forwarder to be acting in the role of agent on behalf of the cargo owner when it deals with the carrier that will actually transport the cargo. These courts recognize the "commercial norm" that forwarders behave as agents in this role and note that any other conclusion would be at odds with the purpose of COGSA, which was intended to give carrier parties to international shipping transactions predictable and limited liability exposure.

In *Kukje Hwajae Insurance Co.* v. *M/V Hyundai Liberty*, 294 F.3d 1171 (9th Cir. 2002), the Ninth Circuit held that the cargo owner was bound by the forum selection clause included in a bill of lading issued by the vessel carrier to a freight forwarder that (like ICC here) is a "non-vessel operating common carrier" ("NVOCC"),[4] even though the

[4] NVOCC is a term of art in maritime commerce referring to a freight forwarder that offers transportation for hire and assumes liability for the safe transportation of the goods as a carrier. It does not operate vessels,

cargo owner was not a party to that bill of lading, and even though the freight forwarder had issued separate bills of lading to the cargo owner. The Ninth Circuit held that the freight forwarder was "acting as [the cargo owner's] agent when it accepted the [vessel carrier's] bill of lading." *Id.* at 1175. The Ninth Circuit observed that it is the "commercial norm" for parties to maritime shipping arrangements to treat the middleman "as the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods." *Id.* at 1176 ("[b]oth commentators and courts have recognized" this principle); *accord Morrow Crane Co.* v. *Affiliated FM Ins. Co.*, 885 F.2d 612, 614-15 (9th Cir. 1989). Thus, the cargo owner would be bound by the terms of the bill of lading issued by the carrier to the freight forwarder. See *Kukje*, 294 F.3d at 1177.

In an earlier decision, the Ninth Circuit similarly recognized the liability limitation enjoyed by carriers under COGSA should not be applied only against parties with which the carriers directly contract. See *Carman Tool & Abrasives, Inc.* v. *Evergreen Lines*, 871 F.2d 897 (9th Cir. 1989). Adopting a different rule would "place far too heavy a burden on the carriers," for a carrier "would not only be required to bring the liability limitation to the attention of the party it actually deals with, but also to other parties that it knows, or should know, have an economic interest in the goods being shipped." *Id.* at 900. This, the court held, is "precisely the type[] of problem[] that COGSA was designed to prevent." *Id.* at 901 (citing Sturley, *Part II*, at 161 & nn. 208-211). Thus, where a shipper who declines to declare a

but instead consolidates small shipments and arranges transportation in its own name with vessel carriers. *Kukje*, 294 F.3d at 1175-76; *Insurance Co. of N. Am.* v. *S/S Am. Argosy*, 732 F.2d 299, 301 & n.2 (2d Cir. 1984); 46 U.S.C. app. § 1702(17)(B) (Shipping Act) (so defining NVOCC and using "ocean freight forwarder" in the narrow sense of an intermediary that merely dispatches shipments for others). ICC, like any freight forwarder issuing an FBL and assuming liability as a carrier, is an NVOCC.

greater value for its goods at the time of arranging for shipment and chooses to insure them instead against damage or loss, it will be bound by that choice, even against parties with whom it did not contract directly. See *id.* Indeed, the Ninth Circuit recognized that the shipper's insurer in that case, as here, was suing "in an attempt to shift . . . the burden of a loss it was paid to insure." *Id.* at 901 n.10.

Like the Ninth Circuit, the Second Circuit has squarely adopted a position on the agency question that is in conflict with the Eleventh Circuit. In *Stolt Tank Containers, Inc.* v. *Evergreen Marine Corp.*, 962 F.2d 276 (2d Cir. 1992), the Second Circuit held that the owner of damaged containers was subject to the liability limitations contained in a bill of lading issued by the carrier to an intermediary without reference to the owner. See *id.* at 279-80. The court of appeals rejected the owner's argument that it could not be bound by a contract to which it was not a party. Instead, "where a party is aware that another is shipping its packages aboard a vessel and has at least constructive notice that liability limitations might apply, that party is bound by the liability limitations agreed to by the shipper." *Id.* at 280. That court observed that "[a] contrary interpretation would defeat COGSA's intended purposes of allocating risk of loss and creating predictable liability rules on which not only carriers but others can rely." *Id.* at 279. In the Second Circuit's view, the Eleventh Circuit's rule would mean that "a carrier, to avoid expanded liability, would have to contract to limit liability not only with the party with whom it actually dealt, but also with all others who might possess an interest in the shipped goods." *Id.*

Other decisions of the Second Circuit are in accord. *Insurance Co. of North America* v. *S/S American Argosy*, 732 F.2d 299 (2d Cir. 1984), similarly involved a freight forwarder that (like ICC) was an NVOCC. Deeming the freight forwarder "a hybrid," the Second Circuit noted that with respect to the cargo owner, the forwarder acts as a

carrier, but "[w]ith respect to the vessel and her owner" it acts as "an agent of the shipper." *Id.* at 301. The *Argosy* court held that the vessel carrier's liabilities to the cargo owner would be determined based upon the terms of its bill of lading issued to the freight forwarder, and not the separate bill of lading issued by that party to the cargo owner (which, in *Argosy*, set forth a higher cap on the carrier's potential liability). In doing so, the Second Circuit recognized that viewing the forwarder as anything other than an agent for the cargo owner would require carriers to undertake greater measures to protect themselves in contracts of carriage – an outcome that would "increase the cost of shipping substantially" and stand at odds with Congress's intentions in passing COGSA. *Id.* at 304.[5]

The Third and First Circuits recognize the same rule as the Ninth and Second Circuits. The Third Circuit, for example, has noted that under COGSA, the carrier treats the forwarder as the agent of the cargo owner (or true customer), although the cargo owner treats the forwarder as a carrier. See *SPM Corp.* v. *M/V Ming Moon*, 22 F.3d 523, 527 (3d Cir. 1994). Indeed, in a COGSA case, the Third Circuit relied on the Second Circuit's decision in *Argosy* for the proposition that a

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[5] More recently, in *Nippon Fire & Marine Insurance Co.* v. *Skyway Freight Systems, Inc.*, 235 F.3d 53 (2d Cir. 2000), the Second Circuit reaffirmed the background federal common law principles that inform its reading of COGSA. In *Nippon Fire*, the cargo owner did not sue the primary air carrier with whom it contracted (and which had gone bankrupt) in order to bring tort claims against two secondary air carriers. The court of appeals held that (a) the cargo owner could not bring tort claims against the secondary carriers, but instead only claims for breach of contract, and (b) the cargo owner would be bound by the terms of the contracts entered into between the primary and secondary carriers, including liability limitations contained therein. "[C]ommon carriers," it held, "are entitled to assume 'that one presenting goods for shipment either owns them or has authority to ship them,'" and therefore the primary carrier is the "agent" of the shipper in contracting with secondary carriers. *Id.* at 61.

shipper will be bound by the liability limitation in a bill of lading issued by a downstream carrier to a carrier directly engaged by the shipper, because in contracting with the downstream carrier, the primary carrier "was acting as an agent for . . . the shipper." *SPM Corp.*, 965 F.2d at 1305 n.9.

In *Puerto Rico Maritime Shipping Authority* v. *Crowley Towing & Transportation Co.*, 747 F.2d 803 (1st Cir. 1984), the First Circuit was faced with determining whether a carrier would be protected by the terms of a contract of carriage into which it entered with a lessee of goods, or instead could be sued by the owner of the goods for full damages. That court determined that it would be improper to penalize the carrier for following the instructions of the lessee, because "[a] carrier ordinarily need not investigate the ownership of the goods that it ships." *Id.* at 804. Instead, in the First Circuit's view, carriers, whether common or private, "can assume that one presenting goods for shipment either owns them or has authority to ship them." *Id.* at 804-05. Although the case did not involve COGSA, the First Circuit's reasoning is equally pertinent here: Hamburg Sud was within its rights to assume that ICC had authority to deal on behalf of Kirby, and Kirby should not be permitted to run from the bargain struck by what was effectively its agent in dealing with Hamburg Sud – particularly where the terms of the agreements were, with respect to the liability limitations of carriers, identical.[6]

Taken together, these cases establish that the majority of the courts of appeals to have addressed the issue recognize the "commercial norm" that forwarders, like ICC, act as agents on behalf of the cargo owners who engage them. Correspondingly, carriers are within their rights under COGSA to rely upon the liability protections that they include

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[6] District court decisions are in accord. *See, e.g., Pearson* v. *Black King Shipping Co.*, 769 F. Supp. 940, 946 (E.D. Va. 1991); *Jockey Int'l* v. *M/V "Leverkesen Express"*, 217 F. Supp. 2d 447, 456-57 (S.D.N.Y. 2002).

when issuing bills of lading not just to cargo owners directly, but to forwarders as well. Under these decisions, Kirby would be bound by the terms of the Hamburg Sud bill of lading to which its agent, ICC, agreed. Norfolk Southern, in turn, would enjoy the protections extended to it in the that bill of lading, including COGSA's $500 per package liability limitation. Pet. App. 63a-64a (Hamburg Sud bill).

b. In conflict with these decisions, the Eleventh Circuit's decision below stands alone. The other courts of appeals directly reject the Eleventh Circuit's holding that when a freight forwarder acts as a carrier and issues its own bill of lading to the cargo owner, the freight forwarder is not the agent of the cargo owner in contracting with vessel carriers to transport the goods. Pet. App. 10a.

The decision below is also in square conflict with this Court's decision in *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 47 U.S. (6 How.) 344 (1848). In that case, one William Harnden "was engaged in the business of carrying for hire small packages of goods . . . for any persons choosing to employ him" between Boston and New York. *Id.* at 379. He contracted in his own name with the owner of steam vessels to carry a crate containing his shipments at a monthly rate, and that contract provided that the crate was carried at Harnden's risk and that the vessel owners assumed no risk of loss of the goods. See *id.* Harden separately contracted with certain banks to transport specie from New York to Boston. See *id.* The vessel sank, and the banks brought a libel *in personam* against the vessel owners.

This Court held that even though Harnden was a carrier in relation to the banks, and even though the banks were not a party to Harnden's contract with the vessel owners, the banks would still be an undisclosed principal to that contract. See *id.* at 380. The Court noted that the banks were the real owners of the property, and that a carrier has a lien against the property but no right of possession against the owner. *"[T]he carrier . . . is considered in law the agent or servant of the*

owner, and the possession of the agent is the possession of the owner." *Id.* at 380 (emphasis added). Accordingly, "the contract between Harnden and the [vessel owners] for the transportation of the specie was, in contemplation of law, a contract between them and the [banks]; and although made in his own name, and without disclosing his employers at the time, a suit may be maintained directly upon it in their own names." *Id.* This Court went on to hold that the contractual limitation of the vessel owner's liability was binding on the cargo owners. See *id.* at 382-84; see also *Chicago, Milwaukee, St. Paul & Pac. R.R.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 488 n.27 (1949) (applying *New Jersey Steam* rule to declare that "the shipper is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier").

Other decisions of this Court embrace the same principles. In *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914), for example, this Court held that a cargo owner was bound to the terms of an agreement entered into by her forwarder without her knowledge with the railroad that transported her personal effects. See *id.* at 514-15; see also *id.* ("If there was any undervaluation, wrongful classification or violation of her instructions, resulting in damage, the plaintiff has her remedy against that [forwarding] Company.").[7] The Eleventh Circuit's decision is, in short, irreconcilable not only with the decisions of other courts of appeals, but also with longstanding precedent of this Court.

c. The ramifications of the decision below are breathtaking. In the age of containerization, it is standard practice for a forwarder to issue a bill of lading to its

[7] In its most recent treatment of a COGSA case, moreover, this Court enforced a forum selection clause in a bill of lading against a subrogee of the cargo owner, who was not a named party of the bill of lading in question. *See Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 530-32, 538 (1995).

customers in its own name, consolidate shipments to gain a full container rate, and then contract separately with a vessel carrier to transport the cargo under the vessel carrier's bill of lading. Under the Eleventh Circuit's view, no vessel carrier will be able to enforce its own bill of lading (including Himalaya clauses) against the owner of the goods. The vessel carrier (and any downstream carriers, agents, or contractors entitled to rely on its bill) will be deprived of the necessary certainty as to its rights, immunities, and duties under the bill of lading vis-à-vis the owners of the goods it carries. There is, moreover, no way for the vessel carrier to protect itself; in international shipping transactions, "the ocean carrier may have no idea that the party to whom it issues its bill is in fact an NVOCC that has issued bills of lading itself." Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 Tul. L. Rev. 337, 396 (2000). The decision below upsets settled expectations and business practices. Indeed, consistent with the authorities outlined above, and as reflected in the Hamburg Sud bill of lading that expressly binds the cargo owner, *supra* at 8-9, it has long been commonly understood that the freight forwarder "contracts with the ocean carrier as agent for the owners of the goods," Davies, *supra*, at 396.

The decision below does more than nullify the force of the vessel carrier's bill of lading against the owner of the goods; it undermines COGSA itself. As noted above, *supra* at 3-5, COGSA, like the Harter Act before it, "regulates the terms of ocean carriage by the indirect but highly efficacious device of dealing with the terms of the ocean bill of lading," Gilmore & Black, *supra*, § 3-25, at 145. If the ocean bill of lading issued to a freight forwarder is unenforceable against the cargo owner, the real party-in-interest, all of the mandatory rules of COGSA (including the liability limitations) are negated. Here, the transaction was structured so that ICC would be a "carrier" entitled to invoke the protections of COGSA. See 46 U.S.C. app. §§ 1301, 1304(5); *Sabah Shipyard Sdn. Bhd.*

v. *M/V Harbel Tapper*, 178 F.3d 400, 404-05 (5th Cir. 1999) ("COGSA's liability limit applies only to 'carriers'" and where forwarder does not enter into contract of carriage with shipper, it does not fall within COGSA's ambit). To hold that ICC's designation as a carrier deprives the true vessel carriers of COGSA's protections is to turn the statute on its head. COGSA is expressly drafted to cap the liability of the carrier and ship against all claimants, regardless of which entity is named in the bill of lading. See 46 U.S.C. app. § 1304(5) ("Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . . .").

Finally, the Eleventh Circuit's ruling grants a windfall to a shipper and its insurer, each of which accounted for the liability limitation in setting their expectations. As one commentator has written of this situation:

> The underwriter has already reimbursed the shipper for the loss pursuant to their insurance agreement. This is exactly what they contemplated when the shipper chose to insure the goods rather than to declare their value, and when the underwriter collected its premium to compensate it for bearing the risk that the goods would be lost or damaged. After the loss, the insurer, who collected a premium, seeks to recover from the carrier, who did not collect a premium, and who thought it was entitled to treat the goods as though they were worth only $500 per package.

Sturley, *Part II*, at 180-81 (footnote omitted).

As the district court ruled, the Himalaya clause of the Hamburg Sud bill, which expressly protects inland carriers as well as "all independent contractors whatsoever," Pet. App. 63a, clearly covers Norfolk Southern. By concluding that ICC was not acting as Kirby's agent when it contracted with Hamburg Sud to transport Kirby's goods, the Eleventh Circuit

adopted a position that cannot be reconciled with general maritime practices, settled common law rules, and the logic behind COGSA, which was intended foremost to give carriers predictable and limited liability exposure. The decision below squarely presents this conflict over the role of forwarders in international shipping transactions, and it provides an ideal vehicle for resolving this dispute.

II. THIS COURT SHOULD RESOLVE THE CONFLICT OVER WHETHER PRIVITY OF CONTRACT IS REQUIRED FOR A PARTY TO BENEFIT FROM A "HIMALAYA CLAUSE" USED IN A CARRIER'S BILL OF LADING.

The Eleventh Circuit also held that Norfolk Southern could not invoke the protections of the Himalaya clause of the ICC bill, which extends the COGSA liability limitations to "any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract." Pet. App. 59a. The court of appeals ruled that, in construing relational terms like "independent contractors" in the Himalaya clause, "the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." *Id.* at 13a, 14a. As the court below recognized, see *id.* at 13a, its decision departs from the rule stated by the Ninth Circuit, which "reject[s] [the cargo owner's] argument that privity of contract is required in order to benefit from a Himalaya clause," *Akiyama Corp.*, 162 F.3d at 574. By subscribing to the contractual privity rule, the Eleventh Circuit joined the Second Circuit, see *Mikinberg* v. *Baltic S.S. Co.*, 988 F.2d 327, 333 (2d Cir. 1993), thereby exacerbating the already existing conflict of authority between the courts of appeals that had been recognized by the district court and both parties below; Pet. App. 24a; see Appellants' Principal Br. at 40-44, *Kirby* v. *Norfolk S. Ry.*, 300 F.3d 1300 (11th Cir. filed Aug. 27, 2001) (No. 01-13776); Brief for Appellee at 40-42, *id.*

a. In *Akiyama*, the relevant Himalaya clause extended the COGSA $500 liability limitation to "'[e]very servant, agent,

and sub-contractor,'" and further defined the term "Subcontractor" to include stevedores and terminal operators. 162 F.3d at 573 (alteration in original). When goods were damaged during stevedoring operations, the cargo owner and its insurer sued, among others, a stevedoring company. The stevedoring company was not in privity of contract with the carrier that issued the bill of lading, but was instead the sub-sub-contractor of the carrier (just as Norfolk Southern was the sub-sub-contractor of ICC in this case). See *id.* at 573-574. Acknowledging that in a previous decision it had looked to the contractual relation of the defendant and the carrier as one of the factors in interpreting Himalaya clauses, see *Mori Seiki USA, Inc.* v. *M.V. Alligator Triumph*, 990 F.2d 444, 450 (9th Cir. 1993), the Ninth Circuit nonetheless squarely rejected the contention that a subcontractor must be in contractual privity with the carrier that issues the relevant bill of lading to receive the benefit of the bill's Himalaya clause. *Akiyama*, 162 F.3d at 574. Instead, the court of appeals concluded, "the proper test is to consider 'the nature of the services performed [by the party seeking protection of the Himalaya clause] compared to the carrier's responsibility under the carriage contract.'" *Id.* at 574 (quoting *Taisho Marine & Fire Ins. Co.* v. *Vessel Gladiolus*, 762 F.2d 1364, 1367 (9th Cir. 1985)). Because stevedoring services were within the scope of the carrier's responsibility, the Ninth Circuit deemed the stevedore a beneficiary of the contract's protections. See *id.* at 573. That court reasoned that if the terminal operator and stevedore were excluded from coverage, "'the Himalaya Clause would be rendered extraordinarily empty.'" *Id.* at 574 (quoting *Institute of London Underwriters* v. *Sea-Land Servs., Inc.*, 881 F.2d 761, 767 (9th Cir. 1989)). Under the Ninth Circuit's comparison-of-services test, there is no question that Norfolk Southern would be protected by the ICC bill's Himalaya clause. ICC assumed responsibility to transport Kirby's goods from Sydney to Huntsville, *supra* at 6-7, and the inland carriage services from Savannah to Huntsville

performed by Norfolk Southern clearly "are services that are [ICC's] responsibility." *Akiyama*, 162 F.3d at 574.

b. In square conflict with the Ninth Circuit, the Second and Eleventh Circuits have held that privity of contract is a requirement for third parties to benefit from Himalaya clauses of this kind. The court below rejected *Akiyama*'s analysis and the Ninth Circuit's position. Pet. App. at 13a. ("We recognize that the Ninth Circuit has arguably taken a different view."). Whereas the Ninth Circuit held that the applicability of a Himalaya clause referring to a "subcontractor" of the carrier would be resolved by the comparison-of-services test without regard to privity of contract, see *Akiyama*, 162 F.3d at 574, the Eleventh Circuit expressly stated that the "Ninth Circuit comparison-of-services rule" could not be applied to an independent contractor of the carrier unless there was privity of contract, Pet. App. 13a n.10.[8] The Second Circuit, in a

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[8] The Eleventh Circuit characterized the Ninth Circuit's rule as "arguably" different from its own based on how the Eleventh Circuit would handle a reference in a Himalaya clause to "stevedores." The Eleventh Circuit clarified the scope of its privity rule: "Privity is required where, as here . . . , the category term being interpreted in the clause is relational, such as 'agent,' 'servant,' or 'independent contractor.' Where, on the other hand, the term [used in the Himalaya clause] is descriptive such as 'stevedore,' 'terminal operator,' etc., privity of contract is not required." Pet. App. 14a n.11. According to the Eleventh Circuit, "the result, though not the language, of *Akiyama* conforms to this rule." *Id.*

The Eleventh Circuit's discussion misconceives both the facts and analysis of *Akiyama*. First, the Himalaya clause in *Akiyama* referred only to "subcontractors," and then in a separate definitional clause defined that term to include "stevedores." *See* 162 F.3d at 573. On the facts of *Akiyama*, a court would still have to resolve whether the term "subcontractors" in the Himalaya Clause referred only to subcontractors in privity with the carrier that issued the bill of lading, or all subcontractors performing carriage services. Second, the Eleventh Circuit mischaracterized the *Akiyama* court's express rejection of the privity requirement as "dicta" because it contradicts the rule established in the Ninth Circuit's earlier decision in *Mori Seiki*. Pet. App. 14a-15a. The Eleventh Circuit failed to heed that the *Akiyama* court expressly analyzed *Mori Seiki* before

series of cases involving Himalaya clauses extending liability limitations to "independent contractors," has likewise enforced the privity-of-contract rule. See *Mikinberg*, 988 F.2d at 333 (discussing cases).[9]

Given the common usage of Himalaya clauses extending COGSA liability to "independent contractors" and "subcontractors," it is vital that this Court resolve the conflict of authority and establish a uniform rule to apply to Himalaya clauses. This Court's intervention is all the more critical now that the Eleventh Circuit has applied the privity-of-contract rule to the standard Himalaya clause in the FBL, the most widely used shipping document in international multimodal transport. See *supra* at 6. Incredibly, under the Eleventh Circuit's rule, only a person in privity of contract with the freight forwarder who issues the FBL is protected by the Himalaya clause. Commonly, the freight forwarder will, as here, be in privity only with the initial carrier. The Eleventh Circuit's rule means that the Himalaya clause will not cover

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it stated the rule of decision (not dictum) that privity of contract was not required. *See Akiyama*, 162 F.3d at 573-74. Regardless, the Eleventh Circuit acknowledges that it applies a different rule than does the Ninth Circuit, and those conflicting rules would yield a different result on the facts of this case.

[9] Other circuits have weighed in on this issue, albeit without exploring it in any great detail. The Fifth Circuit, for example, has stated that it "requires privity of contract of carriage before liability under COGSA arises." *Thyssen Steel Co.* v. *M/V Kavo Yerakas*, 50 F.3d 1349, 1353 (5th Cir. 1995); *accord Gebr. Bellmer Kg.* v. *Terminal Servs. Houston, Inc.*, 711 F.2d 622, 625 (5th Cir. 1983) (including stevedores hired as independent contractors by the carrier's agent within reach of Himalaya clause). Discussion in the caselaw of the Third and First Circuits also highlights the confusion in the lower courts on this issue. *See, e.g., SPM Corp.*, 965 F.2d at 1305 n.9 (suggesting that contractual privity alone is insufficient for a Himalaya clause to extend protection to third party); *EAC Timberlane* v. *Pisces, Ltd.*, 745 F.2d 715, 719 (1st Cir. 1984) (opining that COGSA applies only to carriers or other parties who have "entered into a contract of carriage with the shipper or ha[ve] some privity of contract with the shipper").

any of the other carriers and other contractors who will perform the actual transportation of the goods to their ultimate destination, including subcontracting ocean carriers,[10] stevedores, terminal operators, and inland carriers of any kind (by air, water, road or rail). This is simply an untenable construction of a through bill of lading for multimodal transport to overseas inland destinations.

The plain language of the FBL refutes the Eleventh Circuit's implausible construction of the Himalaya clause, and underscores the impropriety of its privity-of-contract rule. First, the Himalaya clause in Clause 10.1 of the ICC bill by its terms extends liability to "any servant, agent *or other person (including any independent contractor) whose services have been used in order to perform the contract*." Pet. App. 59a (ICC ¶ 10.1). Because independent contractors are a subset of persons whose services are used to perform the contract, it makes no sense to restrict the term "independent contractors" further to cover only those contractors in privity with the freight forwarder. Further, Clause 10.2, referring to the "persons" identified in section 10.1, provides that "[i]n entering into this contract . . . , the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract." *Id.* at 59a-60a (ICC bill ¶ 10.2). This clause "is primarily intended for systems of law which require a contract to give other persons than the carrier himself the

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[10] For example, it is increasingly prevalent for large vessel operators to share space on one another's vessels, yet each operator continues its own marketing operations and books cargo in its own name, servicing its own customers even though only one party will handle the physical carriage. The party handling actual carriage will then engage the additional subcontractors needed to complete all of the carriage operations. Thus, many of the operators who benefit from the shared space arrangement will have no privity of contract to the subcontractors who complete the carriage. *See generally* Mary T. Reilly, *Identity of the Carrier: Issues under Slot Charters*, 25 Tul. Mar. L.J. 505, 513-16 (2001).

benefit of limitation of and exemption from liability (the so-called doctrine of privity of contract)." Ramberg, *supra*, at 67. It would be passing strange if the FBL, having eliminated the requirement of privity with the shipper in 10.2, had required privity with the carrier in 10.1. Finally, Clause 10.1 uses parallel language to Clause 2.1's definition of the persons for whose acts the freight forwarder assumes liability, Pet. App. 55a, 59a, and it is indisputable that such liability extends to the acts of all service providers, not just those in privity with the freight forwarder, see Ramberg, *supra*, at 51 (freight forwarder "cannot avoid a liability for such other persons by referring to his status as an intermediary"). The Eleventh Circuit's wooden privity-of-contract rule is irreconcilable with the plain meaning of the FBL.

The decision below undermines the economic basis of international shipping transactions under the FBL and destroys reliance interests. Under the FBL, the cargo owner knows the extent of the liability of those performing services under the contract of carriage, and it can obtain favorable shipping rates by accepting those limitations, insuring for the balance. Pet. App. 59a (FBL ¶ 10.1) (the "aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in clause 8"). On the other end of the transaction, carriers and others can undertake to provide services connected to the transportation of goods under the bill of lading without risk of indeterminate liability. There is no sound economic basis for a privity-of-contract rule; the cargo owner's expectations and decisions do not in any sense depend on whether the freight forwarder performs its contract of carriage by subcontractors or sub-subcontractors. The Eleventh Circuit simply gives cargo owners and insurers a "windfall" by allowing them to prevail on a "technicality" of an implied-in-law privity rule that undercuts the force of the agreement under which all the relevant carriers reasonably assumed they were protected. *Id.* at 20a (Siler, J., dissenting).

The Eleventh Circuit therefore has struck a double blow against carriers and other service providers in international commerce. In conflict with the precedents of other courts of appeals and of this Court, it has wrongly held that a vessel carrier's bill of lading issued to a freight forwarder in its own name (including its Himalaya clause) is unenforceable against the cargo owner, and then invoked a privity-of-contract rule to deny such entities the protections of FBL Himalaya Clauses to which they are clearly entitled. Such conflicts "are precisely the type most likely to be intolerable, because litigants can easily exploit them through forum shopping." Sturley, *Observations*, at 1268 (discussing COGSA); see *id.* at 1270-71 (noting also that lack of uniformity causes parties to shipping arrangements to over-insure). This case squarely presents two critical and independent issues on which the courts of appeals are divided in an area of law where consistency is vital. Indeed, "[t]he need for uniformity is so great that it would generally be better for the [Supreme] Court to resolve a conflict incorrectly . . . than to allow the conflict to stand." *Id.* at 1275. Review by this Court of this case is therefore imperative.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 01-13776

JAMES N. KIRBY, PTY LTD., d.b.a. Kirby Engineering,
MMI General Insurance Limited,
Plaintiffs-Appellants,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia.

Aug. 8, 2002

Before EDMONDSON, Chief Judge, and CARNES and SILER [*], Circuit Judges.

CARNES, Circuit Judge:

This case, the facts of which began in Australia and ended in Alabama, is about Himalaya clauses, Clauses Paramount, COGSA, the package limitation defense, FBLs, FIATA, and the like. In short, it is a bill of lading case. The issue it presents us is whether a railroad's liability, if any, to a shipper for damage done to goods by the derailment of train is limited by the "Himalaya clause" in either of two bills of lading that were issued for the transport of the goods.

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[*] Eugene E. Siler, Jr., Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

A Himalaya clause is a clause in a bill of lading that extends the carrier's defenses and limitations of liability under the bill to the carrier's agents and subcontractors.[1] Both bills of lading in this case contained Himalaya clauses, although the text of each clause is different. The first bill of lading was issued to James N. Kirby Pty Ltd. (Kirby) by International Cargo Control Pty Ltd. (ICC), an Australian freight forwarder Kirby hired to arrange the shipment of the machinery, and the second bill of lading was issued to ICC by Hamburg Sud, the ocean shipping company ICC hired to perform the actual transport of the goods. Hamburg Sud's ship brought the machinery from its port of departure, Sydney, Australia, to its port of discharge, Savannah, Georgia, where it was placed on a train owned by Norfolk Southern Railway Co., which Hamburg Sud had sub-contracted to transport the machinery inland to its destination, Huntsville, Alabama. The wreck occurred while the train was en route to Huntsville from Savannah, and allegedly caused $1.5 million of damage to the machinery.

The district court decided that Norfolk Southern could limit its liability to Kirby on the basis of the Himalaya clause in the Hamburg Sud bill. We conclude, however, that the Hamburg Sud bill does not limit Norfolk Southern's liability to Kirby because Kirby was not bound by its terms. We further conclude that although the terms of the ICC bill do bind Kirby, that bill does not limit Norfolk Southern's liability because Norfolk Southern is not a clearly designated beneficiary of that bill's Himalaya clause. Therefore, because the district court erroneously concluded that Norfolk Southern should be able to limit its liability to Kirby, we reverse and remand.

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[1] Himalaya clauses take their name from an English case which involved a vessel called the HIMALAYA. *Certain Underwriters at Lloyds' v. Barber Blue Sea Line,* 675 F.2d 266, 269 n. 5 (11th Cir.1982).

I. BACKGROUND

Kirby, a company based in Sydney, Australia, sold ten containers of machinery to the General Motors plant in Huntsville, Alabama. To fulfill its obligation to deliver the machinery to Huntsville, Kirby entered into a contract of carriage with ICC, another Australian company. ICC was a "freight forwarder," a company that arranges for, coordinates, and facilitates cargo transport. To formalize the contract of carriage, ICC issued a bill of lading to Kirby (the ICC bill of lading) for the ten containers of machinery.

The ICC bill of lading embodies ICC's contractual obligation to Kirby to deliver the machinery from Sydney to Huntsville. It names Kirby as the consigner of the cargo, and ICC as the carrier. It designates Sydney as the port of loading, Savannah as the port of discharge, and Huntsville as the ultimate destination of the machinery. It contains a Clause Paramount that invokes the defenses and limitations of liability of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315 to govern ICC's liability to Kirby for any damage done to the goods in the course of the carriage. Finally, it contains a Himalaya clause, a contractual clause that extends to the carrier's agents and contractors the carrier's own defenses and limitations of liability under the bill. *See Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co.*, 254 F.3d 987, 993 n. 1 (11th Cir.2001). Specifically, the Himalaya clause in the ICC bill of lading extends the bill's limitations of ICC's liability to "any servant, agent or other person including any independent contractors whose services have been used to perform the contract."

Having been hired by Kirby, ICC then hired Hamburg Sud,[2] a German ocean shipping company, to transport the

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[2] The full name of the German company is Hamburg Sudamerikanische Dampfschifahrts-Geseilschaft Eggert & Amsink, which roughly translates to "Hamburg South American Steam Shipping Company."

machinery from Sydney to Huntsville. Hamburg Sud issued its own bill of lading (the "Hamburg Sud bill") to ICC. On the Hamburg Sud bill, ICC was listed as the shipper, and Hamburg Sud as the carrier. Like the ICC bill, the Hamburg Sud bill named Sydney as the port of loading, Savannah as the port of discharge, and Huntsville as the destination. The Hamburg Sud bill contained its own Clause Paramount, and its own Himalaya clause that extended the bill's limitations on Hamburg Sud's liability to "all agents, servants, employees, representatives, all participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever."

A Hamburg Sud ship carried the machinery on the ocean leg of the journey, from Sydney to Savannah. Once in Savannah, inland transport to Huntsville was taken on by Norfolk Southern, which had been hired by Hamburg Sud through Columbus Line USA, Hamburg Sud's American subsidiary.[3] Norfolk Southern did not issue its own bill of lading to Columbus Line, but instead acted under the Hamburg Sud bill. The train carrying the containers derailed while en route from Savannah to Huntsville, and allegedly $1.5 million dollars of damage was done to the machinery.[4]

After the train wreck, Kirby sued Norfolk Southern to recover for the damages caused to the machinery by the derailment. Kirby's claims included negligence and breach of contract, among others. Norfolk Southern denied that it

[3] The parties dispute the nature of Columbus Line USA's relationship to Hamburg Sud. Norfolk Southern says Columbus is merely the name under which Hamburg Sud does business in the United States; Kirby claims that Columbus Line U.S.A. is a separate corporate subsidiary of Hamburg Sud. That dispute, however, does not matter to our decision.

[4] Kirby had insured the machinery against such damage with MMI General Insurance, Ltd., and was reimbursed by MMI for the loss. Thus MMI appears with Kirby as a plaintiff in this lawsuit.

was liable, but also filed a motion for partial summary judgment arguing that its liability, if any, was limited by the Himalaya clause in the Hamburg Sud bill of lading.

As mentioned, a Himalaya clause in a bill of lading extends to the carrier's agents and contractors the carrier's defenses and limitations of liability under the bill. Here, as is often the case, both bills invoked the Carriage of Goods by Sea Act (COGSA), meaning that the carrier's defenses and limitations under each bill-and, by extension, the defenses and limitations of any party covered by each bill's Himalaya clause included those provided to carriers by COGSA.[5] One COGSA defense available to a carrier is the "package limitation," which limits the carrier's liability for damage to goods to $500 per package (when the goods are shipped in packages). 46 U.S.C. app. § 1304(5). By invoking COGSA in the Clause Paramount, each bill incorporated COGSA's package limitation as a limit on the carrier's liability. In its summary judgment motion Norfolk Southern claimed that it was entitled, via the Himalaya clause, to claim the package limitation, and thus limit its liability to $5,000—$500 for each of Kirby's ten containers.[6]

The district court granted Norfolk Southern's motion for partial summary judgment, holding that Norfolk Southern's liability to Kirby, if any, was limited to $5,000. The court concluded that the Himalaya clause in the Hamburg Sud bill

[5] COGSA applies of its own force from "tackle to tackle," that is from the time goods are loaded onto the ship to the time they are discharged from it. *See Mannesman Demag Corp. v. M/V CONCERT EXPRESS*, 225 F.3d 587, 589 (5th Cir.2000). The Clause Paramount extends the application of COGSA's liability rules beyond the tackles, just as the Himalaya clause extends the application of those rules to parties other than the carrier.

[6] Whether a container is a COGSA "package" is a topic of frequent dispute. *See, e.g., Tropical Shipping*, 254 F.3d at 997. The issue is not, however, material to disposition of this appeal.

of lading bound Kirby, and that Norfolk Southern was a beneficiary of that clause entitled to invoke the package limitation. The district court then designated its order granting partial summary judgment as appropriate for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and we granted permission to appeal on the issue of whether the bills of lading limit Norfolk Southern's liability.[7]

II. DISCUSSION

We first consider whether the district court was right to decide that the Himalaya clause in the Hamburg Sud bill limited Norfolk Southern's liability to Kirby. Because we conclude that it was not right in that regard, we next consider whether Norfolk Southern's liability is limited by the Himalaya clause in the other bill of lading, the ICC bill. We conclude that it is not so limited. The result of our conclusions that neither bill of lading limits Norfolk Southern's liability to Kirby is that we reverse the district court's grant of partial summary judgment to Norfolk Southern.

A. THE HAMBURG SUD BILL

The Hamburg Sud bill was issued by Hamburg Sud, the ocean shipping company, to ICC, the freight forwarder which had been engaged by Kirby. The Himalaya clause in the Hamburg Sud bill can limit Norfolk Southern's liability to Kirby only if Kirby is bound by the terms of that bill. Yet ICC, not Kirby, hired Hamburg Sud, and ICC, not Kirby, is named on the bill as the shipper of the goods, which means that Kirby did not itself agree to the terms of the bill. If, however, ICC had been acting as Kirby's agent when it entered the shipping contract with Hamburg Sud, then ICC had authority to and did bind Kirby to the terms of the bill,

[7] There were some prior events that tangled up the appeal for a while, but they were eventually straightened out. We will not take up the reader's time with a recounting of them.

including its package limitation and its Himalaya clause. *See, e.g., Great N. Ry. Co. v. O'Connor*, 232 U.S. 508, 513-14, 34 S.Ct. 380, 382, 58 L.Ed. 703 (1914) (holding that a plaintiff who used a freight forwarder to arrange a shipment of goods was bound by limitations of liability in the contracts the freight forwarder made with carriers on the plaintiff's behalf). Therefore, Norfolk Southern can limit its liability to Kirby only if ICC was acting as Kirby's agent when it received Hamburg Sud's bill. Whether it was acting as Kirby's agent at that time is, then, the pivotal question.

ICC's status as a freight forwarder is not itself dispositive of the question, because freight forwarders "may act as agents or as principals, depending on the facts." Stephen G. Wood, *Multimodal Transportation: an American Perspective on Carrier Liability and Bill of Lading Issues*, 46 Am. J. Comp. L. 403, 413 (1998). A freight forwarder acts as an agent when its role is merely to arrange a contract between the cargo owner and the ocean carrier. The ocean carrier issues a bill of lading directly to the cargo owner, who is listed as the shipper on the bill, and the cargo owner pays the ocean carrier, not the freight forwarder, for the carriage. A freight forwarder acts as a principal when it takes on the role of carrier itself, and issues its own bill to the cargo owner listing the cargo owner as the shipper and itself as the carrier. In this latter scenario, the cargo owner pays the forwarder, not the ocean carrier. The forwarder then subcontracts out to an ocean carrier its responsibility under its bill to carry the goods. The ocean carrier issues to the forwarder a second bill of lading that lists the forwarder as the shipper, that is, as a principal.

In this case, ICC was acting as a carrier—a principal—and not as Kirby's agent. This is evident, first, from the structure of the transaction. There were two bills of lading. If ICC had been acting as Kirby's agent, there would have been only one bill of lading, issued by Hamburg Sud to Kirby and listing

Kirby as the shipper. Instead, ICC issued a bill to Kirby, and then ICC in turn was issued a bill by Hamburg Sud. The Hamburg Sud bill listed ICC, not Kirby, as the shipper, thereby evidencing that Hamburg Sud was contracting with ICC as principal and not as agent for Kirby.

That ICC was not acting as Kirby's agent is further evident from the language of the ICC bill. The ICC bill expressly states that ICC was undertaking "to *perform* . . . the entire transport," or "*in [its] own name* to procure the performance of the entire transport." This plain language shows that ICC and Kirby clearly intended that ICC would act as a principal in any subsequent contracts it entered into for the transport of the machinery. In the bill ICC assumes responsibility "for the acts or omissions of its servants or agents." Again, this language indicates that ICC was not acting as Kirby's agent, because if ICC were acting as Kirby's agent it would not be liable for the acts of other agents it hired on behalf of Kirby—they would be Kirby's agents, not ICC's.

The form of the ICC bill also shows ICC was a principal, not Kirby's agent. The bill ICC issued to Kirby was a standard form bill known in the industry as a FBL, which is short for "FIATA Multimodal Transport Bill of Lading."[8] The fact that the bill was an FBL is evident on the face of the bill, whose upper right hand corner bears a logo with the words "FBL" and "FIATA Multimodal Transport Bill of Lading." Commentary from the drafters of the FBL indicates that, when the FBL form is used, the freight forwarder assumes the role of carrier and therefore becomes a principal. *See* Jan Ramberg, *The Law of Freight Forwarding and the 1992 FIATA Multimodal Transport Bill of Lading* 7 (1993)

[8] FIATA is the International Federation of Freight Forwarders Associations, a non-governmental association that represents the freight forwarding industry. "Multimodal" means transport by more than one mode of transportation, e.g., by both ship and rail.

(chair of the FIATA committee that initially drafted the FBL explaining that "[b]y use of FBL the freight forwarder progresses from the legal jungle and clearly establishes himself as a carrier with carrier liability"). While the intent of the drafters of the FBL form does not alone determine the nature of the relationship between Kirby and ICC, that intent, together with the fact that ICC and Kirby chose to use the FBL form, buttresses our conclusion that in receiving ICC's bill Kirby did not engage ICC as its agent, but instead hired ICC as a principal carrier to perform the transport, which ICC in turn sub-contracted to Hamburg Sud.

The Hamburg Sud bill reinforces the conclusion that ICC was acting as principal, and not as Kirby's agent, when it engaged Hamburg Sud. That bill lists ICC, not Kirby, as the party with whom Hamburg Sud was contracting. If ICC had merely been acting as Kirby's agent, arranging a contract between Kirby and an ocean carrier, we would expect the contract with the ocean carrier to reflect as much by indicating that Kirby was a party to the transaction. Yet Kirby's name does not appear on the Hamburg Sud bill.

Finally, our own case law suggests that a freight forwarder should not automatically be taken to be the agent of the party who hires it to facilitate the shipment of goods. In *Naviera Neptuno S.A. v. All Int'l Freight Forwarders, Inc.* 709 F.2d 663, 665 (11th Cir.1983), we reviewed a district court's finding that a freight forwarder was not the agent of the party on whose behalf it had arranged the transport of cargo. Based on its reading of case law, the district court had stated a rule that "absent special particular arrangements between a shipper and its freight forwarder, which arrangements would manifest the requisite exclusivity and control incident to a principal/agent relationship, a freight forwarder is considered as an independent contractor." *Id.* Applying that rule, the district court found that the freight forwarder had not been the agent of the owner of the goods. *Id.* We upheld that finding.

Id. Implicit in our doing so was approval of the rule applied by the district court. In the present case, there were no "special particular arrangements" between Kirby and ICC indicating "exclusivity and control" characteristic of an agency relationship. Instead, Kirby and ICC conducted their transaction on the basis of a form bill, a form bill which, as we have noted, was specifically intended to clearly establish that the freight forwarder, ICC, was *not* the agent of the shipper, Kirby.

Therefore, as the parties intended, and as our case law suggests, when ICC issued its bill to Kirby, ICC did not become Kirby's agent and so did not act as Kirby's agent when it received the second bill of lading from Hamburg Sud.[9] This means that Kirby is not bound by the Himalaya

[9] Norfolk Southern's main argument to the contrary is that, even though the parties did not intend for ICC to act as Kirby's agent, ICC must have been Kirby's agent because ICC was barred from acting as a carrier (and thus as a principal) by federal statute. Norfolk Southern argues that, if ICC was a carrier, it must have been an "ocean transportation intermediary," and as such was required by 46 U.S.C. app. § 1718(a) to have a license from the Federal Maritime Commission. Yet, according to Norfolk Southern, ICC did not have a license.

This argument fails for a number of reasons. First, the licensing requirement Norfolk Southern invokes was not in force at the time that the ICC and Hamburg Sud bills of lading were issued for the transport of Kirby's cargo. The licensing requirement for "ocean transport intermediaries" came into effect in 1999, but the ICC-Kirby transaction occurred in 1997. *Compare* Ocean Shipping Reform Act of 1998, §§ 2, 116, Pub.L. No. 105-258, 112 Stat.1902, 1912 (amending § 1718(a) to require licenses for ocean transport intermediaries); *with* 46 U.S.C. app § 1718(a) (1994) (statute in force at time of Kirby-ICC transaction). Second, even if that statutory requirement had been in force at the time of the Kirby-ICC transaction, it applies only to a "person in the United States," which ICC, an Australian company doing business in Australia, was not. 46 U.S.C. app. § 1718(a). Third, there was no evidence in the summary judgment record that ICC had not registered with the F.C., a point on which Norfolk Southern, as the movant, had the burden of proof. Finally, Norfolk Southern has not convinced us that, even if ICC had been required to have a license to act as a carrier, its failure to have one would work to Kirby's detriment by rendering Kirby bound to the terms of a contract entered into by a party it had never made its agent.

clause in the Hamburg Sud bill, and that the district court erred in deciding that Norfolk Southern could limit its liability to Kirby based on the Hamburg Sud bill of lading.

B. THE ICC BILL

The ICC bill was issued by ICC to Kirby. Because Kirby was a party to the ICC bill it was clearly bound by that bill's terms, including its Himalaya clause. Thus any beneficiary of that Himalaya clause would be entitled to use it to limit its liability to Kirby. Norfolk Southern, however, is not a beneficiary of the Himalaya clause in the ICC bill, because the language of the clause does not specifically identify Norfolk Southern as a member of a well-defined class of its beneficiaries, as is required by the case law.

The roots of that requirement lie in the seminal American case on Himalaya clauses, *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 79 S.Ct. 766, 3 L.Ed.2d 820 (1958). In *Herd*, the Supreme Court refused to extend a bill of lading's liability limitations to a stevedore, because the bill only mentioned the carrier as the beneficiary of those limitations. *Id.* at 302, 79 S.Ct. at 769-70. The *Herd* Court, however, left open the possibility that a clause in a bill of lading could limit the liability of parties hired by the carrier, if drafted with sufficient clarity to specifically identify those parties. *Id.* Subsequent cases made that possibility a reality. Today Himalaya clauses are standard fare in bills of lading. However, courts addressing the enforceability of Himalaya clauses are constrained by the *Herd* Court's admonition that "contracts purporting to grant . . . limitation of liability must be strictly construed and limited to their intended beneficiaries." *Herd*, 359 U.S. at 305, 79 S.Ct. at 771.

In this Circuit and its predecessor, Himalaya clauses have been enforced since soon after *Herd*. To temper the enforceability of Himalaya clauses with the principle that those clauses must be narrowly construed and limited to their intended beneficiaries, this Court has developed a "clarity of language" test for determining whether and for whom a Himalaya clause effectively limits liability. *See, e.g. Generali v. D'Amico*, 766 F.2d 485, 488 (11th Cir.1985); *Certain Underwriters at Lloyds v. Barber Blue Sea Line*, 675 F.2d 266, 270 (11th Cir.1982). Under our clarity of language test, we will enforce a Himalaya clause only if it is drafted with "language expressing a clear intent to extend the benefits to a well-defined class of readily identifiable persons," and we will allow the clause to be enforced only by members of that well-defined class. *Hale Container Line, Inc. v. Houston Sea Packing Co.*, 137 F.3d 1455, 1465 (11th Cir.1998).

The Himalaya clause in the ICC bill extends ICC's limitations on liability under the bill to "any servant, agent, or other person including any independent contractors whose services have been used in order to perform the contract." The question is whether this language is clear enough to "extend the benefits to a well-defined class of readily identifiable persons" that includes Norfolk Southern, the inland carrier. "Other person," as a category, is too vague to define a clearly identifiable class of persons, and so it fails to satisfy the clarity of language requirement. *Cf. Rupp v. Int'l Terminal Operating Co.*, 479 F.2d 674, 676 (2d Cir.1973) (finding phrase "all persons rendering services in connection with this contract" overbroad and therefore ineffective). This leaves, then, a Himalaya clause that extends to "any servant, agent, or . . . . any independent contractors."

We have previously stated that "[w]hen a bill refers to a class of persons such as agents and independent contractors, it is clear that the contract includes all those persons engaged by the carrier to perform the functions and duties of the carrier

within the scope of the carriage contract. No further degree of clarity is necessary." *Certain Underwriters*, 675 F.2d at 270. Thus, for example, it is not necessary to enumerate specific categories of agents or independent contractors, such as "stevedore," "terminal operator," and the like. *Id.*

As to the ICC bill, however, Norfolk Southern was not "engaged by the carrier," ICC. Instead, Norfolk Southern was engaged by Hamburg Sud, who in turn had been engaged by ICC, the carrier. Norfolk Southern was a sub-sub-contractor, rather than a party directly "engaged by the carrier," and so it is not "clear that the contract includes" Norfolk Southern in the Himalaya clause. *Id.* If Kirby and ICC had intended for the protections of the ICC bill to extend to sub-sub-contractors, they could have said so. *See, e.g., Uncle Ben's v. Hapag-Lloyd Aktiengesellschaft*, 855 F.2d 215, 218 n. 2 (5th Cir.1988) (interpreting a Himalaya clause "for the benefit of the servants, employees and agents of the carrier as well as of such independent contractors *(including their servants, employees and agents*) whose services the carrier from time to time may engage . . .") (emphasis added); *Gebr. Bellmer KG v. Terminal Serv. Houston, Inc.*, 711 F.2d 622, 625 (5th Cir.1983) (same language).

We recognize that the Ninth Circuit has arguably taken a different view. *Akiyama Corp. of Am. v. M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (9th Cir.1998) (rejecting the argument that privity of contract is required in order to benefit from a Himalaya Clause, and focusing instead on comparing "the nature of the services performed [by the defendant who seeks to invoke the clause] compared to the carrier's responsibility under the carriage contract" (internal quotations omitted)).[10] In this Circuit, however, *Certain*

[10] We also acknowledge that we have previously spoken approvingly of the Ninth Circuit's comparison-of-services rule. In *Hale*, we laid out a two prong test for use in order "[t]o determine whether a party is an independent contractor referenced in a Himalaya clause." 137 F.3d at

Underwriters' limitation of Himalaya clause protections to those parties "engaged by the carrier," together with the *Herd* principle of narrow construction, mean that the law requires privity between the carrier and the party seeking shelter in the Himalaya clause.[11]

1465-1466. Specifically, we said that "a court should (1) compare the nature of the services provided by the party with the carrier's responsibilities under the bill of lading or contract of carriage, and (2) consider whether the independent contractor's duty had been fulfilled at the time when the liability was incurred." *Id.* The first prong of that test is taken from the law of the Ninth Circuit, specifically from *Taisho Marine & Fire Ins. Co. v. Vessel Gladiolus*, 762 F.2d 1364 (9th Cir.1985), which is the same case from which *Akiyama* derived its rule. *Akiyama*, 162 F.3d at 574. In *Hale* we did not, however, affirm this test to the exclusion of a privity requirement. To the contrary, the very ground on which we denied the defendant the protection of the Himalaya clause in *Hale* was exactly that "Houston [the defendant] was neither an agent nor independent contractor of Project Logistics [the carrier] . . . . was not directly employed by Project Logistics, did not receive payment for its services from Project Logistics, had no contractual relationship with Project Logistics, and was not rendered an agent by Project Logistics." *Id.* at 1366. That is, in *Hale* we concluded that the defendant was not entitled to the benefit of the Himalaya clause specifically because he lacked privity (whether by contract, agency, or employment) with the carrier. Thus the result in *Hale* supports our conclusion in this case.

[11] Privity is required where, as here, and as in *Certain Underwriters*, the category term being interpreted in the clause is relational, such as "agent," "servant," or "independent contractor." Where, on the other hand, the term is descriptive, such as "stevedore," "terminal operator," etc., privity of contract is not required. Indeed, the result, though not the language, of *Akiyama* conforms to this rule. In *Akiyama* the two parties were allowed to invoke the Himalaya clause. The first was a terminal operator, who did have contractual privity with the carrier, and was held to be covered by the relational term "independent contractor" in the clause. *Akiyama*, 162 F.3d at 574. The second was a stevedore, who contracted with the terminal operator and thus did not have direct contractual privity with the carrier, but was held to be covered by the descriptive term "stevedore" in the clause. *Id.* We also note that, while the dicta in *Akiyama* says a party seeking to invoke the Himalaya clause

In addition to not having been "engaged by the carrier," Norfolk Southern, unlike any other defendant that we have allowed to claim the benefit of a Himalaya clause, is an inland carrier. In all of our prior Himalaya clause cases, the defendant invoking the Himalaya clause has been a stevedore or other provider of port services. *See, e.g., Fireman's Fund Ins. Co. v. Tropical Shipping and Const. Co.*, 254 F.3d 987, 992 (11th Cir.2001) (stevedore); *Hiram Walker & Sons, Inc. v. Kirk Line*, 877 F.2d 1508, 1510 (11th Cir.1989) (stevedore); *Certain Underwriters*, 675 F.2d at 269 (stevedore and terminal operator). Thus the question of whether and when an inland carrier can claim the benefit of a Himalaya clause is, in this Circuit, still an open one. Other courts that have addressed this issue have reached a variety of results. Almost every court that has extended the protections of a Himalaya clause to an inland carrier has done so in a case where the language of the clause specifically referenced inland carriers. *See, e.g., Canon USA, Inc. v. Norfolk Southern Ry. Co.*, 936 F.Supp. 968, 971-72 (N.D.Ga.1996); *Tokio Marine & Fire Ins. Co. v. Hyundai Merchant Marine Co.*, 717 F.Supp. 1307, 1309 (N.D.Ill.1989); *but see Taisho Marine and Fire Ins. Co. v. Maersk Line*, 796 F.Supp. 336, 339-40 (N.D.Ill.1992) (holding that a rail carrier was covered by a through bill's Himalaya clause that referred only to "subcontractors"). Further, many courts have refused to extend the coverage of a Himalaya clause to an inland carrier when the clause or the bill did not refer to inland transportation. *See, e.g., Caterpillar Overseas, S.A. v. Marine Transport, Inc.*, 900 F.2d 714, 726 (4th Cir.1990) (refusing to extend the protections of a

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need not be in privity with the carrier, the reasoning of another, earlier Ninth Circuit case implicitly contradicts that dicta. *Mori Seiki USA, Inc. v. M/V Alligator Triumph*, 990 F.2d 444, 450-51 (9th Cir.1993) (allowing a stevedore to claim the benefit of a Himalaya clause only after concluding that the party with whom the stevedore contracted, the seaport operator, had acted as the carrier's agent in hiring the stevedore, thereby putting the stevedore in privity with the carrier).

Himalaya clause to a trucker because "[t]ransporting cargo down a group of public highways for a stretch of miles . . . is not a normal maritime operation"); *see also Lucky-Goldstar Int'l, Inc. v. S.S. California Mercury*, 750 F.Supp. 141 (S.D.N.Y.1990). Thus the cases seem to support the principle that a special degree of linguistic specificity is required to extend the benefits of a Himalaya clause to an inland carrier.

This principle makes sense in light of the origins and purpose of Himalaya clauses. Himalaya clauses originally were aimed more at extending COGSA protections to additional parties who handle cargo in and around a port than at extending the reach of those protections inland. That is why most of our cases concerning Himalaya clauses have involved as the defendants stevedores, terminal operators, and other similar parties whose work is done at or close to the point where the cargo is unloaded from the ship. We should be cautious about extending the reach of a Himalaya clause, and with it the reach of COGSA, inland.

We observe that caution in this case even though the bill, unlike bills we have considered in our previous Himalaya clause cases, was a "through bill," that is, a bill which provided for transport to an inland destination rather than merely to the port of discharge. *See Tokio Marine*, 717 F.Supp. at 1309 (defining through bill); *cf. Caterpillar*, 900 F.2d at 726 (declining, where the bill of lading only provided for ocean transport, to afford a trucker a Himalaya clause's protection of "independent contractors" because trucking is not a "maritime service"). The ICC bill identified Huntsville as the point of delivery, which clearly indicates that the bill envisioned land transportation as being necessary to the completion of the contract. This does not mean, however, that the bill also envisioned that the liability regime for the inland leg of the journey would be provided by COGSA via the Himalaya clause. *But see Taisho Marine*, 796 F.Supp. at

340 (relying on the fact that the bill was a through bill in holding that a rail carrier was covered by the Himalaya clause's reference to "subcontractors").

The intent of the drafters of the form bill used between ICC and Kirby reinforces this observation. The FBL form was drafted based on a "network" approach to carrier liability. *See, e.g.*, Ramberg, *supra* at 25, 30-35, 37, 41-42, 65. The network approach envisions that each leg of a journey should be subject to the liability rules governing the mode of transport for that leg. *Id.* at 24. So, for example, losses on the sea leg would be governed by the rules applicable to the carriage of goods by sea, and losses on the rail leg would be subject to the liability regime applicable to railroads. Because the FBL was drafted with this "network" liability system in mind, its Himalaya clause was not designed to extend the liability regime for sea carriers—COGSA—to inland carriers, who instead would be covered by the different liability scheme applicable to rail carriers. The FBL's Himalaya clause is only meant to extend the carrier's protections to parties who are, so to speak, between liability regimes, at the fringes of the sea regime—stevedores, terminal operators, and the like. Therefore, Norfolk Southern, as an inland rail carrier, should not be allowed to invoke the Himalaya Clause in the ICC FBL to its benefit.

This is not to say that a Himalaya clause can never readily identify a well-defined class of persons that includes inland carriers like Norfolk Southern. However, if the Himalaya clause is to extend inland, it must say so with specificity, as, for example, did the Himalaya Clause in the Hamburg Sud bill when it clearly identified as among its beneficiaries "all participating (*including inland*) carriers." (emphasis added). *Cf., e.g. Lucky-Goldstar*, 750 F.Supp. at 145 ("If the parties . . . had intended to include [the railroad] among those protected, little effort would have been required for them to have added to [the Himalaya] clause the term 'inland

carriers,' for example."); *Canon USA*, 936 F.Supp. at 973 ("road and rail transport operators"); *Toshiba Int'l Corp. v. M/V Sea-Land Exp.*, 841 F.Supp. 123, 128 (S.D.N.Y.1994) ("participating land carrier"). Requiring that the clause mention inland transport better satisfies our clarity of language requirement and serve its progenitor, *Herd's* principle that liability limitations in bills of lading must be narrowly construed.

We therefore hold that the language of the Himalaya clause in the ICC bill, which names as its beneficiary "any servant, agent, or other person including any independent contractors whose services have been used in order to perform the contract," does not clearly identify Norfolk Southern, as a sub-sub contractor of the carrier and an inland carrier, as a member of the "well-defined class of readily identifiable persons" entitled to claim the benefits of the clause. *Hale*, 137 F.3d at 1465.

III. CONCLUSION

Norfolk Southern is not entitled to limit its liability to Kirby on the basis of either of the two bills of lading issued for the transport of Kirby's machinery from Sydney to Huntsville. The Himalaya clause in the Hamburg Sud bill does not bind Kirby, and Himalaya clause in the ICC bill of lading does not benefit Norfolk Southern. Therefore, the district court erred in granting partial summary judgment to Norfolk Southern.

REVERSED.

SILER, Circuit Judge, dissenting:

I respectfully dissent from the majority decision. First, I disagree with the majority's conclusion that ICC was acting as a principal, not as Kirby's agent. As the majority states, ICC was a freight forwarder. Although a freight forwarder can be a principal, in this case it was acting as an agent for Kirby. The bill of lading between Kirby and ICC put Kirby on notice that ICC would have to employ other entities to transport the freight. I do not see any significance in having two bills of lading rather than one, which, the majority concludes, is evidence that ICC was not Kirby's agent. There is nothing in the record which indicated that Kirby expected ICC to ship the goods other than by contracting it with another carrier. When Kirby entered into a written contract with ICC to make arrangements for the transportation of the shipment, it declined the opportunity to obtain full liability coverage via its contract. Instead, COGSA through the Clause Paramount limited liability of the carrier.

As the majority states, Kirby was bound by the terms of the bill of lading between it and ICC. That included the Himalaya Clause. Thus, that would include a limitation of liability for Hamburg Sud. I also think that Norfolk Southern was a beneficiary of the Himalaya Clause in the Kirby/ICC bill of lading. Clearly, the bill does not include the name "Norfolk Southern," nor does it say that it includes any inland carrier. Nevertheless, it includes "independent contractors." When the bill of lading between Kirby and ICC was issued, Kirby knew that an inland carrier would have to be used, because of the destination being Huntsville, Alabama. It also knew that it had agreed to a limitation of liability for the carrier. As the majority states, Kirby and ICC could have used clearer language in the bill to include any inland carriers, but that does not mean that the failure to include them specifically precludes the application of a Himalaya Clause. *See Certain Underwriters v. Barber Blue Sea Line*, 675 F.2d 266, 270

(11th Cir.1982) ("The 'clarity of language requirement,' [as stated in *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 305, 79 S.Ct. 766, 771, 3 L.Ed.2d 820 (1959)], does not mean, however, that COGSA benefits extend only to parties specifically enumerated in the bill of lading. It is sufficient that the terms express a clear intent to extend benefits to well-defined class of readily identifiable persons.") I would follow the decision in *Akiyama Corp. v. M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (9th Cir.1998), which focused upon "the nature of the services performed compared to the carrier's responsibility under the carriage contract." I find no inconsistency in that decision with our decision in *Certain Underwriters*.

I also agree with the district court that Kirby was bound by the ICC/Hamburg Sud bill of lading, as it was a "through bill" which covered the entire transportation from Australia to Alabama. The ICC/Hamburg Sud bill of lading expressly included inland carriers. Therefore, the Himalaya Clause extended COGSA protection to Norfolk Southern. *See Taisho Marine & Fire Ins. Co. v. Maersk Line, Inc.*, 796 F.Supp. 336, 339-40 (N.D.Ill.1992); *Tokio Marine & Fire Ins. Co. v. Hyundai Merchant Marine Co.*, 717 F.Supp. 1307, 1309 (N.D.Ill.1989).

When Kirby initially engaged ICC, it accepted the risk and agreed to the limitation of liability on the part of ICC and all of its sub-contractors. Its insurer seeks a windfall by claiming no privity of contract. Kirby knew from the start that the ultimate destination would have to be through an inland carrier, so it should not be able to prevail on the technicality of its lack of privity of contract. Therefore, I would affirm the decision of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed May 17, 2001]

CIVIL ACTION
NO. 1:98-CV-2939-CAP

JAMES N. KIRBY, PTY LTD. d/b/a
Kirby Engineering, and MMI General Insurance, Ltd.,

Plaintiffs,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

ORDER

By its previous order, dated October 11, 2000 [Doc. No. 39-1], the court granted the defendant's motion for partial summary judgment [Doc. No. 33-1] and motion to dismiss plaintiff's state law claims [Doc. No. 33-2]. Specifically, the court held that the $500.00 per container COGSA limitation applies to the defendant and limits its liability, if any, to a maximum of $5,000.00. Further, the court held that the plaintiff's state court actions are preempted and barred. Finally, the court held that the plaintiff has, no cause of action against the defendant for punitive damages or recklessness.

Based upon the court's grant of partial summary judgment and dismissal of the plaintiff's state law claims, on October

11, 2000, the Clerk entered judgment in favor of the defendant and dismissed the case [Doc. No. 40-1]. The Clerk's entry of judgment and dismissal were premature. Although the court dismissed four of the five counts in this action, the plaintiffs still have a breach of contract claim.

Accordingly, on January 18, 2001, the court granted the defendant's motion for clarification or in the alternative to set aside the judgment [Doc. No. 47-1] . Pursuant to FED. R. CIV. P. 60(a), the court set aside the entry of judgment and dismissal. The case was to proceed on this remaining claim. Because, however, the case was then pending before the Eleventh Circuit, the parties are unsure of this court's jurisdiction to enter this order. Regardless, now that the Eleventh Circuit has dismissed the appeal jurisdiction over this case unquestionably rests with this court.

The matter is presently before the court on the parties' joint motion to certify partial summary judgment for immediate permissive review. In this motion the parties request that the court, once again, enter an order to set aside the October judgment, now that the court's jurisdiction to do so is no longer in doubt. Further, they also request that the court amend its October order to include a certification of appropriateness for interlocutory appeal of the October order under 28 U.S.C. § 1292(b) and to stay further proceedings in this court until further action by the Eleventh Circuit.

Interlocutory appeals are governed by 28 U.S.C. § 1292(b), which provides, in pertinent part, that:

> When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal

> from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Exceptional circumstances are required to justify a departure from the general policy of postponing appellate review until after the entry of final judgment. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475, 98 S. Ct. 2454 (1978). The statute requires an order "that is directly associated with the disposition of at least a claim, if not the entire case itself." *Harris v. Luckey*, 918 F.2d 888, 891 (11th Cir. 1990). In the Eleventh Circuit there is a "strong presumption against interlocutory appeals." *United States v. One Parcel of Real Property*, 767 F.2d 1495, 1498 (11th Cir. 1985). The availability of review under Section 1292(b) is subject to both the district court's willingness to certify the matter for review and the appellate court's willingness to hear the appeal. *See Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1387 (11th Cir. 1998); *and see* 28 U.S.C. § 1292(b) (stating that, after certification of interlocutory appeal by district court order, "[t]he Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order") ; *see also Mason v. Stallings*, 82 F.3d 1007, 1009-10 (11th Cir. 1996). Importantly, Section 1292(b) directs district courts to certify an "order" and not a "controlling question," even though in deciding whether to do so a court must analyze whether there are any controlling legal questions. *See Yamaha Motor Corp. U.S.A. v. Calhoun*, 516 U.S. 199, 205, 116 S. Ct. 619 (1996) (noting that "the appellate court may address any issue fairly included within the certified order because 'it is the order that is appealable, and not the controlling question identified by the district court.'") (citations omitted).

The key holding that the parties hope to resolve on appeal is this court's holding that the defendant's liability, if any, is limited to $5,000. If the defendant were to be found liable at trial and judgment were entered for $5,000, and if on appeal the Eleventh Circuit were to conclude that the defendant cannot so limit its liability, then a reversal would be necessary. Both parties submit that a full trial on the merits now would be pointless if the defendant's liability is limited to $5,000. If this court's October order is ultimately upheld on appeal, then the case will likely settle for the limitation amount and no trial will be held. Conversely, if the October order is reversed, then the parties submit that they are still likely to settle, albeit at a much higher figure. In the interim, the parties are unable to settle the case because the limitation question has not been finally resolved on appeal.

If permitted to appeal, then the plaintiffs intend to argue that a Himalaya clause may not extend a carrier's limitation rights to a "sub-contractor" such as the defendant. The plaintiffs submit that there are substantial grounds for a difference of opinion because of opposing opinions from the Second and Ninth Circuits. *See e.g. Mikinberg v. Baltic S.S. Co.*, 988 F.2d 327 (2d Cir. 1993) (accepting the plaintiffs' argument) ; *compare e.g. Akiyama Corp. of America v. M.V. Hanjin Marseilles*, 162 F.3d 571 (9th Cir. 1998) (rejecting the plaintiffs' argument). Thus, the parties agree that there is a well-established conflict of authority between two "leading maritime circuits . . . on an issue that the Eleventh Circuit has never addressed . . . ." Joint Motion to Certify at 6.

The parties submit that the entire litigation will likely terminate once the issue of the defendant's liability limitation is finally resolved. According to the parties, if this court does not certify its order for interlocutory appeal, it will be necessary to have a full trial on the liability question, have the court limit any plaintiffs' verdict to $5,000, and then enter a final judgment that the plaintiffs would be entitled to appeal

as of right. In doing so, the parties will be required to conduct a trial with multi-million dollar damages at stake. Such effort and expense would prove pointless for all the parties and the court if this court's October order is affirmed. Thus, the parties submit that resolving the liability question now, before a full trial, will "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The court agrees.

After reviewing the relevant cases and authorities, the court concludes that its October order should be certified. Simply stated, this is the type of case that could benefit from an interlocutory appeal.

CONCLUSION

Having reviewed the record, for the above reasons, the court finds that it is in the best interests of the parties and consistent with the spirit of judicial economy to grant the instant joint motion. The court finds that its order [Doc. No. 39-1] involves a controlling question of law on which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of this litigation.

Accordingly, the court hereby GRANTS the defendant's motion for clarification or in the alternative to set aside the judgment [Doc. No. 47-1]. Pursuant to FED. R. CIV. P. 60 (a), the court hereby SETS ASIDE the entry of judgment and dismissal entered by the Clerk [Doc. No. 40-1]. The case will proceed on the remaining breach of contract claim.

The court hereby GRANTS the parties' joint motion to certify partial summary judgment for immediate permissive review [Doc. No. 50-1]. Accordingly, pursuant to FED. R. CIV. P. 60 (a), the court hereby AMENDS its order [Doc. No. 39-1] and CERTIFIES its order for interlocutory appeal.

The court hereby STAYS all proceedings in this case until the Eleventh Circuit rules on the immediate appeal.

SO ORDERED, this 17 day of May, 2001.

/s/ Charles A. Pannell,
CHARLES A. PANNELL, JR.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed Oct. 11, 2000]

CIVIL ACTION
NO. 1:98RCV-2939-CAP

JAMES N. KIRBY, PTY LTD. d/b/a
Kirby Engineering, and MMI
General Insurance, Ltd.,
Plaintiffs,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant.

ORDER

The plaintiffs filed the instant action, seeking to recover for damages to certain cargo which occurred when the defendant's train de-railed. The matter is currently before the court on the defendant's motion for partial summary judgment and motion to dismiss state law claims.

I. BACKGROUND AND PROCEDURAL HISTORY

James N. Kirby, PTY Ltd. d/b/a Kirby Engineering ("Kirby"), an Australian firm, manufactures machinery in Australia. Kirby sold ten containers of machinery, valued at over $2,000,000, to the General Motors plant in Huntsville, Alabama. To get the containers from Australia to Alabama, Kirby entered into a Bill of Lading contract with International

Cargo Control ("ICC"), an Australian cargo broker. ICC does not transport cargo, but rather arranges for cargo transportation by carriers.

The Kirby/ICC Bill of Lading contained a limitation of liability provision which limited ICC's responsibility for loss or damage to Kirby's cargo to $500.00 per package. *See* Carriage of Goods by Sea Act ("COGSA"); 46 U.S.C. § 1300, et seq. In contracting, Kirby was given the opportunity to declare a value in excess of $500.00 and to obtain higher coverage for its cargo, paying an additional ad valorem rate charge for the shipment. Instead, Kirby separately insured its cargo with its co-plaintiff, MMI General. Insurance, Ltd. ("MMI").

After entering into the bill with Kirby, ICC entered a "through" bill of lading contract with a steamship company, Hamburg Sudamerikanische Dampfschifahrts-Geseilschaft Eggert and Amsinck ("Hamburg Sud"), to transport the containers from Australia to Huntsville, Alabama. The ICC/Hamburg Sud Bill of Lading also provided for a $500.00 per package limitation of liability, and gave ICC the opportunity to declare a cargo value in excess of $500.00 per container. ICC did not declare a higher value for the plaintiff's cargo.

Hamburg Sud used one of its subsidiaries, Columbus Line Australia Pty. Ltd. ("Columbus Lines Australia"), for the carriage of the goods by sea. To handle the overland part of the transport, Columbus Line Australia used another company, Columbus Line USA, Inc. ("Columbus Line USA"), which contracted with Norfolk Southern Railway Company (the "defendant"), a Virginia corporation. On October 9, 1997, the defendant's train, carrying Kirby's cargo, derailed in Alabama. The defendant had issued freight bills for the shipment, but did not issue its own bill of lading. Rather, the defendant acted for Columbus Lines USA, which acted for

Hamburg Sud, under the Hamburg Sud/ICC Bill of Lading, which was entered by ICC pursuant to the Kirby/ICC Bill of Lading. Thus, there is no direct contractual relationship between Kirby and the defendant.

The defendant, contends that its liability for damages to Kirby's cargo, if any, is contractually limited to $500.00 per package or $5,000.00. The plaintiffs, through several separate claims, seek to recover the full value of the goods. Alternatively, the plaintiffs assert that the defendant's recklessness negates the contractual limitation of liability. The defendant claims that no one is at fault for the derailment. The plaintiff's expert found that the misapplication of the airbrakes, coupled with the dangerous nature of the particular stretch of track, demonstrates that the defendant's engineer acted in "conscious disregard of a substantial risk of harm and with knowledge that damage would probably result, i.e. recklessness."

The Language of the Contracts

A. Kirby/ICC Bill of Lading

The Kirby/ICC Bill of Lading provided that ICC would ship Kirby's goods, from Sydney, Australia, as the Port of Loading, to Huntsville, Alabama, as the Place of Delivery, and included a $500.00 per package limitation of liability. The Kirby/ICC Bill of Lading also included a box designated "Declared Value for Ad Valorem Rate According to the Declaration of the Consignor," which could have been utilized by Kirby to declare a higher value for its cargo, if it had so desired. The instructions relative to electing higher values, and the consequences of failing to do so are provided in Paragraph 8.6(b) of the contract:

> Unless the nature and value of the goods shall have been declared by the Merchant and inserted in this FBL, and the ad valorem freight rate paid, the liability of the

> Freight Forwarder under COGSA, where applicable, shall not exceed U.S. $500 per package or, in case of goods not shipped in packages, per customer freight unit.

Kirby did not declare a value in excess of the $500.00 limitation of liability, nor pay the additional ad valorem rate charge.

B. ICC/Hamburg Sud Bill of Lading

The defendant contends that the ICC/Hamburg Sud Bill of Lading was a "through shipment," which means that the place of the delivery of the shipment is not the same as the port of discharge. The Bill assumed an inland portion and provided that:

> the Carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by it in relation to the Goods or Containers . . . It is understood and agreed that if it should be adjudged that any person or entity other than or in addition to the Carrier is under any responsibility with respect to the Goods . . . , all exemptions of and exonerations from liability provided by law or by the Terms and Conditions hereof shall be available to all agents, servants, employees, representatives, all participating (including inland) carriers and all stevedores, terminal operators, warehouseman, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever. In contracting for the foregoing exemptions, limitations of and exonerations from liability, the Carrier is acting as agent and trustee for and on behalf of all persons described above, all of whom shall to this extent be deemed a party the contract evidence by this Bill of Lading . . . The Carrier [may] undertake [ ] . . . such

> services as necessary and shall have the right at its sole discretion to select any mode of land, sea or air transport . . .

(emphasis added) ICC/Hamburg Sud Bill of Lading at Sub-Section 5 (Exhibit B to defendant's memorandum in support of its motion for partial summary judgment). Further, similar to the Kirby/ICC Bill of Lading, pursuant to the terms of the COGSA, the ICC/Hamburg Sud Bill of Lading limited the liability of Hamburg Sud, and any other "participating carrier [ ]," by sea, land, or air, to $500.00 per container. Similar to Kirby in the Kirby/ICC Bill of Lading, ICC had the opportunity to declare a higher value on the ICC/Hamburg Sud Bill of Lading, as well as pay a higher ad valorem charge to transport the shipment, and did not do so.

C. Columbus Lines USA's Contract with Norfolk Southern

Columbus Lines USA contracted with the defendant to transport the cargo by rail. The defendant contends that the ICC/Hamburg Sud Bill of Lading, recited above, extended the COGSA liability limitation to it via Paragraph 5(a) of that Bill, entitled Subcontracting Beneficiaries, which specifically provides that:

> the Carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by it in relation to the Goods or Containers . . . .

The defendants argue that when Columbus Lines contracted with the defendant for the inland transportation, the $500.00 per package limitation of liability was contractually extended to the defendant. The provision of the contract extending

that limitation, generally known as a "Himalaya" clause, provides that:

> It is understood and agreed that if it should be adjudged that any person or entity other than or in addition to the Carrier is under any responsibility with respect to the Goods . . ., all exemptions of and exonerations from liability provided by law or by the Terms and Conditions hereof shall be available to all agents, servants, employees, representatives, all participating (including inland) carriers and all stevedores, terminal operators, warehouseman, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever.

(emphasis added) The plaintiffs counter that the defendant's are bound by the Intermodal Rules Circular (the "Circular"), because the defendant's initial correspondence relied on the Circular.

II. LEGAL DISCUSSION

A. *Legal Standard For Summary Judgment*

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment when all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." The party seeking summary judgment bears the burden of demonstrating that no dispute as to any material fact exists. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156, 90 S. Ct. 1598, 1608 (1970); *see also Bingham, Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir. 1984). The moving party's burden is discharged merely by "'showing'—that is, pointing out to the District Court—that there is an absence of evidence to support [an essential element of] the nonmoving party's case." *Celotex*

Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). In determining whether the moving party has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. *See Bradbury v. Wainwright*, 718 F.2d 1538, 1543 (11th Cir. 1983). Once the moving party has adequately supported its motion, the non-movant then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986).

In deciding a motion for summary judgment, it is not the court's function to decide genuine issues of material fact but to decide only whether there is such an issue to be tried. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 2511 (1986). The applicable substantive law will identify those facts that are material. Facts that in good faith are disputed, but which do not resolve or affect the outcome of the case, will not preclude the entry of summary judgment as those facts are not material. *See Anderson*, 477 U.S. at 247, 106 S. Ct. at 2510.

Genuine disputes are those by which the evidence is such that a reasonable jury could return a verdict for the non-movant. *See id.* In order for factual issues to be "genuine" they must have a real basis in the record. *See Matsushita*, 475 U.S. at 586, 106 S. Ct. at 1356. When the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Id.* (citations omitted).

B. *Applicability of Bill of Lading Terms to the Defendant*

Simply, the defendant argues that it is entitled to the $500.00 per package limitation of liability protection afforded to the carrier by the COGSA and the bill of lading. *See generally* 46 U.S.C. § 1300, et seq. Conversely, the plaintiffs

argue that the defendant, a land-based rail carrier, is not protected by the limitation of liability provisions.

The COGSA governs the rights, obligations, and liabilities of the parties to a bill of lading for the carriage of goods by sea. The COGSA provides a strict limitation on the carrier's liability: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package." 46 U.S.C. § 1304(5). The COGSA, by its terms, only applies to the ocean portion of the shipment. *See* 46 U.S.C. § 1301(e).

A bill of lading, however, can contractually expand the COGSA coverage to third-parties if it expresses a clear intent to provide benefits "to a well-defined class of readily identifiable persons" such as agents and subcontractors. *See Canon USA, Inc. v. Norfolk Southern Railway, Co.*, 936 F. Supp. 968, 971 (N.D. Ga. 1996); *and see Certain Underwriters at Lloyds' v. Barber Blue Sea Line*, 675 F.2d 266, 270 (11th Cir. 1982). Such a clause is called a "Himalaya Clause" and is to be strictly construed. *See id.*; *Robert C. Herd & Co. v Krawill Mach. Corp.*, 359 U.S. 297, 305, 79 S. Ct. 766, 771 (1959).

The plaintiffs argue that the COGSA does not apply to the defendant because it lacked a direct contractual relationship with the shipper and so it cannot enjoy the benefit of the Himalaya clause contained in the ICC/Hamburg Sud Bill of Lading. Essentially, the plaintiffs contend that while the ICC/Hamburg Sud Bill of Lading may extend COGSA coverage to a subcontractor, it cannot extend that coverage to a sub-subcontractor, because the clause at issue does not express a clear intention to provide those benefits to a "well defined class of readily identifiable persons" that includes the defendant. *See Lucky-Goldstar Int'l v. S.S. California Mercury*, 750 F. Supp. 141 (S.D.N.Y. 1990). Thus, the plaintiff contends that the ICC/Hamburg Sud Bill of Lading

lacks the required clarity of language. *See Lucky-Goldstar Int'l*, 750 F. Supp. at 145. Further, the plaintiffs argue that the specific language of the Himalaya clause in the ICC/Hamburg Sud Bill of Lading at Sections 10.1, 10.2, and 10.4, fails to provide that the carrier can sub-contract on "any terms" and does not include the term "inland carriage." The failure to include these terms in *Lucky-Goldstar*, was fatal to the Himalaya Clause's protection for the defendant. *See id.*

The defendant counters that the instant Himalaya clause extended the COGSA limitation of liability to it, even though it is an inland carrier. *See Certain Underwriters at Lloyds'*, 675 F.2d at 266. The defendant points out that in the Eleventh Circuit:

> [t]he 'clarity of language' requirement does not mean . . . that COGSA benefits extend only to parties specifically enumerated in the bill of lading. [Rather], [i]t is sufficient that the terms express a clear intent to extend benefits to a well-defined class of readily identifiable persons. When a bill refers to a class of persons such as 'agents' and 'independent contractors' it is clear that the contract includes all those persons engaged by the carrier to perform the functions and duties of the carrier within the scope of the carriage contract. No further degree of clarity is necessary.

Id. at 270. While the defendant concedes that the COGSA is not compulsorily applicable to it, it argues that the Himalaya clause contained in paragraph 5 of the ICC/Hamburg Sud Bill of Lading makes it applicable. Thus, the parties' chief disagreements on this issue are over the scope of the ICC/Hamburg Sud Bill of Lading and the clarity of the class definition contained therein.

To this end, the defendant argues that the Bill of Lading was a "through bill" which covered the entire voyage from Australia to Huntsville, Alabama. "A through bill of lading

governs the entire transportation of goods and applies to connecting carrers even though they are not parties to the contract." *Tokio Marine & Fire Ins. Co. v. Hyundai Merchant Marine Co.*, 717 F. Supp. 1307, 1309 (N.D.I11. 1989). Where a bill of lading designates on its face the final destination, then it is a through bill. *See Taisho Marine and Fire Ins. v. Maersk Line Inc.*, 796 F.Supp. 336, 339 (N.D.I11. 1992). The ICC/Hamburg Sud Bill of Lading lists Savannah, Georgia, as its "port of discharge from vessel" and Huntsville, Alabama, as its "place of delivery." The defendant argues that because no second bill of lading for the inland portion of the cargo's transport was issued and the ICC/Hamburg Sud Bill of Lading contemplates a through shipment, the bill was a through bill.

In reviewing bills of lading purporting to extend COGSA protection beyond the carrier or ship, the court strictly construes the contract and limits the intended beneficiaries "for they're not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language expresses such to be the understanding of the contracting parties.'" *Robert C. Herd & Co.*, 359 U.S. at 305, 79 S. Ct. 766. Although mindful that "disputed questions regarding the parties' intentions should not be adjudicated on a motion for summary judgment," *Savarin Corp. v. National Bank of Pakistan*, 290 F. Supp. 285 (S.D.N.Y. 1968), the court recognizes that the shipping industry is exacting in its documentation requirement and will hold parties to the "technical precision of [the] language" of the agreement to which they are bound. *Toyomenka, Inc. v. S.S. Tosaharu Maru*, 523 F.2d 518, 520 (2d Cir. 1975). The ICC/Hamburg Sud Bill of Lading expressly includes the phrase "(including inland) Carriers." This court holds that where a Himalaya clause expressly extends COGSA protection to "inland carriers," railroads are included and protected by COGSA. *See Tokio Marine & Fire Ins. Co. v. Hyundai Merchant Marine Co.*, 717 F.Supp. 1307,

1309 (N.D.I11. 1989); *Royal Insurance v. Westwood Transpacific Service*, No. C-88-832M (W.D.Wash. April 25, 1990). The language in the ICC/Hamburg Sud Bill of Lading is clear and unambiguous, and the defendant is entitled to COGSA protection.

The plaintiffs' alternative argument that it is not bound to the terms of the ICC/Hamburg Sud Bill of Lading because its contract is the Kirby/ICC Bill of Lading is wholly without merit. One who contracts with others to make arrangements for the transportation of his goods is bound by the terms of the contract entered into on his behalf. *See Great Northern Railway Co. v. O'Connor*, 232 U.S. 508, 34 S. Ct. 380 (1914). The plaintiff erroneously argues that the Himalaya clause at issue is the one contained in the Kirby/ICC Bill of Lading. Rather, the applicable bill to the instant dispute is the one which the defendant contracted and performed under, the ICC/Hamburg Sud Bill of Lading. As explained above, that bill's Himalaya clause unambiguously contemplates inland carriers and thus the defendant.

C. *State Law Claims*

The plaintiffs have asserted several state law causes of action, including negligence, bailment, recklessness, and punitive damages. The COGSA, however, preempts causes of action that arise under state law, except where there has been criminal misconduct by a carrier or its agent. *See Jones v. Compagnie Generale Maritime*, 882 F.Supp. 1079, 1085 (S.D.Ga. 1995) ("the intent to commit a criminal act is what removes behavior from COGSA's reach"). Having carefully reviewed the pleadings, depositions and affidavits, the court finds that the plaintiff has made no showing of criminal intent. Accordingly, the defendant is entitled to summary judgment as to the plaintiffs' state law claims.

D. *Recklessness Claim*

The Kirby/ICC Bill of Lading provides that the Freight Forwarder is not entitled to the limitation of liability if the cargo is damaged by an intentional act or recklessness. Putting aside the question of whether any party besides ICC can be considered a Freight Forwarder, the court finds that the plaintiffs erroneously rely on the Kirby/ICC Bill of Lading. The defendant performed its contract pursuant to the ICC/Hamburg Sud Bill of Lading which does not contain the "recklessness" language at issue. Whether the defendant was reckless is immaterial to the enforceability of COGSA under the ICC/Hamburg Sud Bill of Lading. Accordingly, the plaintiffs have no cause of action against the defendant for punitive damages or recklessness.

III. CONCLUSION

For the foregoing reasons, the court hereby GRANTS the defendant's motion for partial summary judgment [Doc. No. 33-1] and motion to dismiss plaintiff's state law claims [Doc. No. 33-2]. Specifically, the court holds that the $500.00 per container COGSA limitation applies to the defendant and limits its liability, if any, to a maximum of $5,000.00. Further, the court holds that the plaintiff's state court actions are preempted and barred. Finally, the court holds that the plaintiff has no cause of action against the defendant for punitive damages or recklessness. In reaching its decision, the court does not address what claims, if any, the plaintiffs may have against ICC, Hamburg Sud, Columbus Lines Australia of Columbus Lines USA.

SO ORDERED, this 11 day of October, 2000.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIIRCUIT

[Filed Oct. 7, 2002]

No. 01-13776-CC

JAMES N. KIRBY, PTY, LTD.,
d.b.a. Kirby Engineering,
MMI GENERAL INSURANCE LIMITED,
Plaintiffs-Appellants,

versus

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant-Appellee.

On Appeal from the United States District Court of the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: EDMONDSON, Chief Judge, CARNES and SILER*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules

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* Honorable Eugene E. Siler, Jr., Circuit Judge, U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Judge Carnes
UNITED STATES CIRCUIT JUDGE

APPENDIX E

46 U.S.C. app. § 1300. Bills of lading subject to chapter

Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter.

(Apr. 16, 1936, c. 229, 49 Stat. 1207.)

46 U.S.C. app. § 1301. Definitions

When used in this chapter—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

(Apr. 16, 1936, c. 229, § 1, 49 Stat. 1208.)

46 U.S.C. app. § 1302. Duties and rights of carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

(Apr. 16, 1936, c. 229, § 2, 49 Stat. 1208.)

46 U.S.C. app. § 1303. Responsibilities and liabilities of carrier and ship

(1) Seaworthiness

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) Cargo

The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) Contents of bill

After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such

marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Bill as prima facie evidence

Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49.

(5) Guaranty of statements

The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

(6) Notice of loss or damage; limitation of actions

Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof, under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(7) "Shipped" bill of lading

After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided*, That if the shipper shall have previously taken up

any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

(8) Limitation of liability for negligence

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

(Apr. 16, 1936, c. 229, § 3, 49 Stat. 1208.)

46 U.S.C. app. § 1304. Rights and immunities of carrier and ship

(1) Unseaworthiness

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness,

the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Uncontrollable causes of loss

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

(3) Freedom from negligence

The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

(4) Deviations

Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however*, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

(5) Amount of liability; valuation of cargo

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper

before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

(6) Inflammable, explosive, or dangerous cargo

Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

(Apr. 16, 1936, c. 229, § 4, 49 Stat. 1210.)

46 U.S.C. app. § 1305. Surrender of rights; increase of liabilities; charter parties; general average

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this chapter shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter. Nothing in this chapter shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

(Apr. 16, 1936, c. 229, § 5, 49 Stat. 1211.)

46 U.S.C. app. § 1306. Special agreement as to particular goods

Notwithstanding the provisions of sections 1303 to 1305 of this title, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided*, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: *Provided*, That this section shall not apply to ordinary

commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

(Apr. 16, 1936, c. 229, § 6, 49 Stat. 1211.)

46 U.S.C. app. § 1307. Agreement as to liability prior to loading or after discharge

Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

(Apr. 16, 1936, c. 229, § 7, 49 Stat. 1212.)

46 U.S.C. app. § 1308. Rights and liabilities under other provisions

The provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 175, 181 to 183, and 183b to 188 of this title or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

(Apr. 16, 1936, c. 229, § 8, 49 Stat. 1212.)

46 U.S.C. app. § 1309. Discrimination between competing shippers

Nothing contained in this chapter shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and

circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this chapter; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 1305 of this title; or (c) in any other way prohibited by the Shipping Act, 1916, as amended.

(Apr. 16, 1936, c. 229, § 9, 49 Stat. 1212.)

46 U.S.C. app. § 1310. Weight of bulk cargo

Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this chapter, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

(Apr. 16, 1936, c. 229, § 11, 49 Stat. 1212.)

46 U.S.C. app. § 1311. Liabilities before loading and after discharge; effect on other laws

Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

(Apr. 16, 1936, c. 229, § 12, 49 Stat. 1212.)

46 U.S.C. app. § 1312. Scope of chapter; "United States"; "foreign trade"

This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however*, That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter: *Provided further*, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter.

(Apr. 16, 1936, c. 229, § 13, 49 Stat. 1212; Proc. No. 2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352.)

46 U.S.C. app. § 1313. Suspension of provisions by President

Upon the certification of the Secretary of Transportation that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of sections 1301 to 1308 of this title, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of said sections for such periods of time or

indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of said sections, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract for the carriage of goods by sea, subject to the provisions of this chapter, effective during any period when sections 1301 to 1308 of this title, or any part thereof, are suspended, shall be subject to all provisions of law now or hereafter applicable to that part of said sections which may have thus been suspended.

(Apr. 16, 1936, c. 229, § 14, 49 Stat. 1213.; Aug. 6, 1981, Pub.L. 97-31, § 12(146), 95 Stat. 166.)

46 U.S.C. app. § 1314. Effective date; retroactive effect

This chapter shall take effect ninety days after April 16, 1936; but nothing in this chapter shall apply during a period not to exceed one year following April 16, 1936, to any contract for the carriage of goods by sea, made before April 16, 1936, nor to any bill of lading or similar document of title issued, whether before or after such date in pursuance of any such contract as aforesaid.

(Apr. 16, 1936, c. 229, § 15, 49 Stat. 1213.)

46 U.S.C. app. § 1315. Short title

This chapter may be cited as the "Carriage of Goods by Sea Act."

(Apr. 16, 1936, c. 229, § 16, 49 Stat. 1213.)

APPENDIX F

Standard Conditions (1992) governing the FIATA MULTIMODAL TRANSPORT BILL OF LADING

Definitions

- Freight Forwarder–means the Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier.
- Merchant–means and includes the Shipper, the Consignor, the Consignee, the Holder of this FBL, the Receiver and the Owner of the Goods.
- Consignor–means the person who concludes the multimodal transport contract with the Freight Forwarder.
- Consignee–means the person entitled to receive the goods from the Freight Forwarder.
- Taken in charge–means that the goods have been handed over to and accepted for carriage by the Freight Forwarder at the place of receipt evidenced in this FBL.
- Goods–means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the Freight Forwarder, irrespective of whether such property is to be or is carried on or under deck.

1. Applicability
Notwithstanding the heading—FIATA Multimodal Transport Bill of Lading (FBL)—these conditions shall also apply if only one mode of transport is used.

2. Issuance of this FBL

2.1 By issuance of this FBL the Freight Forwarder

a) undertakes to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL:

b) assumes liability as set out in these conditions.

2.2. Subject to the conditions of this FBL the Freight Forwarder shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or any other person of whose services he makes use for the performance of the contract evidenced by this FBL, as if such acts and omissions were his own.

3. Negotiability and title to the goods

3.1. This FBL is issued in a negotiable form unless it is marked-non negotiable-. It shall constitute title to the goods and the holder, by endorsement of this FBL, shall be entitled to receive or to transfer the goods herein mentioned.

3.2. The information in this FBL shall be prima facie evidence of the taking in charge by the Freight Forwarder of the goods as described by such information unless a contrary indication, such as–shipper's weight, load and count-, -shipper-packed container-or similar expressions, has been made in the printed text or superimposed on this FBL. However, proof to the contrary shall not be admissible when the FBL has been transferred to the consignee for valuable consideration who in good faith has relied and acted thereon.

* * * *

6. Freight Forwarder's Liability

6.1. The responsibility of the Freight Forwarder for the goods under these conditions covers the period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery.

6.2. The Freight Forwarder shall be liable for loss of or damage to the goods as well as for delay in delivery if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Clause 2.1a. unless the Freight Forwarder proves that no fault or neglect of his own, his servants or agents or any other person referred to in Clause 2.2. has caused or contributed to such loss, damage or delay. However, the Freight Forwarder shall only be liable for loss following from delay in delivery if the Consignor has made a declaration of interest in timely delivery which has been accepted by the Freight Forwarder and stated in this FBL.

* * * *

7. Paramount Clauses

7.1. These conditions shall only take effect to the extent that they are not contrary to the mandatory provisions of International Conventions or national law applicable to the contract evidenced by this FBL.

7.2. The Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading, dated Brussels 25th August 1924, or in those countries where there are already in force the Hague-Visby Rules contained in the Protocol of Brussels, dated 23rd February 1968, as enacted in the Country of Shipment, shall apply to all carriage of goods by sea and also to the carriage of goods by

inland waterways, and such provisions shall apply to all goods whether carried on deck or under deck.

7.3. The Carriage of Goods by Sea Act of the United States of America (COGSA) shall apply to the carriage of goods by sea, whether on deck or under deck, if compulsorily applicable to this FBL or would be applicable but for the goods being carried on deck in accordance with a statement on this FBL.

8. Limitation of Freight Forwarder's Liability.

8.1. Assessment of compensation for loss of or damage to the goods shall be made by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with this FBL, they should have been so delivered.

8.2. The value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there are no such prices, by reference to the normal value of goods of the same name and quality.

8.3. Subject to the provisions of subclauses 8.4 to 8.9. Inclusive, the Freight Forwarder shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher, unless the nature and value of the goods shall have been declared by the Consignor and accepted by the Freight Forwarder before the goods have been taken in his charge, or the ad valorem freight rate paid, and such value is stated in the FBL by him, then such declared value shall be the limit.

8.4. Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the FBL as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.

8.5. Notwithstanding the above mentioned provisions, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the Freight Forwarder shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.

8.6. a) When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the Freight Forwarder's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

b) Unless the nature and value of the goods shall have been declared by the Merchant and inserted in this FBL, and the ad valorem freight rate paid, the liability of the Freight Forwarder under COGSA, where applicable, shall not exceed US $ 500 per package or, in the case of goods not shipped in packages, per customary freight unit.

8.7. If the Freight Forwarder is liable in respect of loss following from delay in delivery, or consequential loss or damage other than loss of or damage to the

goods, the liability of the Freight Forwarder shall be limited to an amount not exceeding the equivalent of twice the freight under the multimodal contract for the multimodal transport under this FBL.

8.8. The aggregate liability of Freight Forwarder shall not exceed the limits of liability for total loss of the goods.

8.9. The Freight Forwarder is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the Freight Forwarder done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

9. Applicability to Actions in Tort

These conditions apply to all claims against the Freight Forwarder relating to the performance of the contract evidenced by this FBL, whether the claim be founded in contract or in tort.

10. Liability of Servants and other Persons

10.1. These conditions apply whenever claims relating to the performance of the contract evidenced by this FBL are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract, whether such claims are founded in contract or in tort, and the aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in clause 8.

10.2. In entering into this contract as evidenced by this FBL, the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such

persons shall to this extent be or be deemed to be parties to this contract.

10.3. However, if it is proved that the loss of or such loss or damage to the goods resulted from a personal act or omission of such a person referred to in Clause 10.1., done with intent to cause damage, or recklessly and with knowledge that damage would probably result, such person shall not be entitled to benefit of limitation of liability provided for in Clause 8.

10.4. The aggregate of the amounts recoverable from the Freight Forwarder and the persons referred to in Clauses 2.2. and 10.1. shall not exceed the limits provided for in these conditions.

11. Method and Route of Transportation

Without notice to the Merchant, the Freight Forwarder has the liberty to carry the goods on or under deck and to choose or substitute the means, route and procedure to be followed in the handling, stowage, storage, and transportation of the goods.

* * * *

APPENDIX G

1. DEFINITIONS.

* * * *

e.) "Merchant" means the shipper, consignee, receiver, holder of this Bill of Lading, owner of the cargo or person entitled to the possession of the cargo and the servants and agents of any of these, all of whom shall be jointly and severally liable to the Carrier for the payment of all Charges, and for the performance of the obligations of any of them under this Bill of Lading.

* * * *

4. THROUGH TRANSPORTATION

When either Place of Receipt or Place of Delivery is set forth herein and is an inland point (Through Transportation basis), Carrier will provide transportation to/from sea terminal and such inland points, which may well involve transport by rail and, notwithstanding anything herein contained, but always subject to Clause 3, herein. Carrier shall be liable for loss or damage of whatsoever nature and however arising to the following extent, but no further:

a.) Upon proof that the loss or damage arose during a part of carriage made subject to Hague Rules legislation or Protocols amending said Rules, as set forth in Clause 3, above, said legislation shall apply; or

b.) Upon proof that the loss or damage not falling within a) above but concerning which the law of any country, state or subdivision thereof contains compulsorily applicable provisions and would have applied if Merchant had made a separate and direct contract with Carrier or a Participating carrier relative to a particular stage of transport wherein the loss or damage occurred and received as evidence thereof a particular document required to be issued, then the liability of

the Carrier and Participating carrier shall be subject to the provisions of such law.

c.) If it should be determined that Carrier bears any responsibility for loss or damage occurring during the custody of the Participating carrier and be subject to law compulsorily applicable to Participating carrier's contract of carriage, then Carrier shall be entitled to all rights, defenses, immunities, exemptions, limitations of and exonerations from liability of whatsoever nature accorded under such Participating carrier's contract of carriage, tariff, and applicable law, provided however, that nothing contained herein shall be deemed a surrender by Carrier of any rights, defenses and immunities or an increase of any of its exemptions, limitations of or exonerations from liability under this Bill of Lading, the Carrier's applicable tariff or laws applicable or relating thereto.

d.) Except where COGSA is compulsorily applicable it is made applicable by this Bill of Lading. Carrier's liability for loss of or damage to the Goods shall not in any event exceed U.S. DLRS 2.50 per kilo of gross weight of the Goods lost or damaged.

5. SUB-CONTRACTING; BENEFICIARIES

a.) The Carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by it in relation to the Goods or Containers or other packages or any other goods.

b.) It is understood and agreed that if it should be adjudged that any person or entity other than or in addition to the Carrier is under any responsibility with respect to the Goods or any other goods, regardless of the port or place where any loss or damage shall occur and without regard to whether the Goods covered hereby or any other goods are being handled or are damaged directly or indirectly during any handling, and

even if the Goods or other goods are transported on free in, stowed and/or free out terms, all exemptions, limitations of, and exonerations from liability provided by law or by the Terms and Conditions hereof shall be available to all agents, servants, employees, representatives, all participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever, in contracting for the foregoing exemptions, limitations of and exonerations from liability, the Carrier is acting as agent and trustee for and on behalf of all persons described above, all of whom shall to this extent be deemed to be a party of the contract evidenced by this Bill of Lading, regardless for whom acting or by whom retained and paid, it being always understood that said beneficiaries are not entitled to any greater or further exemptions, limitations of or exonerations from liability than those that the Carrier has under this Bill of Lading in any given situation.

c.) The Carrier undertakes to procure such services as necessary and shall have the right at its sole discretion to select any mode of land, sea or air transport and to arrange participation by other carriers to accomplish the total or any part of the carriage from Place of Receipt to Place of Delivery, except as may be otherwise provided herein.

d.) No agent or servant of the Carrier shall have power to waive or vary any of the terms hereof unless such waiver or variation is in writing and is specifically authorized or ratified in writing by an officer or director of the Carrier having actual authority to bind the Carrier to such waiver or variation.

* * * *

17. LIMITATION OF LIABILITY

Except as otherwise provided in this Clause and except as provided under any compulsorily applicable law, including, if compulsorily applicable, the Australian Carriage of Goods by

Sea Act 1991, the Carrier's liability shall be limited to U.S. $500 lawful money per package or per customary freight unit unless the nature of the cargo and valuation higher than $500 per package or per customary freight unit shall have been declared by Merchant before shipment and inserted in Bill of Lading, and extra freight paid if required. In such case, if the limitation amount shall exceed declared value, Carrier's liability, if any, shall not exceed declared value.

As to cargo shipped in bulk, the limitation applicable shall be that provided in Section 130-1(5) of COGSA, or such other legislation, convention or law as may be applicable. In no event shall anything herein be construed as a waiver of limitation as to cargo shipped in bulk.

If, on the reverse side hereof, the parties characterize the Container as a package or a lump sum freight is assessed, in either event, liability shall be limited to U.S. $ 500 per Container even if furnished by the Carrier. Notwithstanding the characterization on the reverse side hereof, where a Container is not furnished and/or stuffed by Carrier, each Container shall conclusively be deemed a single package and Carrier's liability limited to $500. In the event this provision is held invalid during a period when compulsory legislation shall apply, it shall nevertheless apply during all non-compulsory periods such as, but not limited to, prior to loading and subsequent to discharge from the Vessel.

Where compulsorily applicable legislation provides a limitation lesser than $500 per package or customary freight unit, such lesser limitation shall apply and nothing herein contained shall be construed as a waiver of a limitation less than $500.

* * * *

Consignor

KIRBY ENGINEERING
JAMES N KIRBY PTY LIMITED
2b6 HORSLEY ROAD
MILPERRA NSW 2214
AUSTRALIA

FBL AU12 – 27086101

NEGOTIABLE FIATA
MULTIMODAL TRANSPORT
BILL OF LADING

Issued subject to UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publication 481)

Consigned to order of

DELPHI SAGINAW STEERING
PLANT 21, HIGHWAY # 31 SOUTH,
ATHENS ALABAMA USA 35612

Notify address

AIR SEA INT'L FORWARDING INC.
1155 WEST CHESTNUT STREET
UNION NJ 07083 USA

INTERNATIONAL
CARGO CONTROL PTY LTD
Level 5, Bayview Tower, 1753 Botany Road, Banksmeadow NSW 2019
Telephone: 61 - 2 - 316 6211 Facsimile: 61 - 2 - 316 6664

Place of receipt

Ocean vessel | Port of loading

QUEENSLAND STAR V0030 SYDNEY

Port of discharge | Place of delivery

SAVANNAH HUNTSVILLE RAIL

Marks and numbers	Number and kind of packages		Description of goods	Gross weight	Measurement
TOLU 4691971 24485573	1	20' O/T CONT	STC : 2 PCS PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 70 CMS O/HEIGHT	16630 KG	41.00 M3
TOLU 4691256 24485570	1	20' O/T CONT	STC : 2 PCS PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 52 CMS O/HEIGHT	19890 KG	41.00 M3
TOLU 4687900 24485569	1	20' O/T CONT	STC : 2 PCS PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 73 CMS O/HEIGHT	19090 KG	41.00 M3
ECCU 7226201 24485572	1	20' O/T CONT	STC : 2 PCS PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 71 CMS O/HEIGHT	16060 KG	41.00 M3
TOLU 4531516 24485575	1	20' O/T CONT	STC : 1 PC PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 70 CMS O/HEIGHT	14100 KG	41.00 M3

CONT ON PAGE 2

E.C.N. No
1B972312114SVC

FREIGHT PREPAID

SHIPPED ON BOARD - 27/08/97

according to the declaration of the consignor

Declaration of interest of the consignor in timely delivery (Clause 6.2.)

- COPY ONLY -

Declared value for ad valorem rate according to the declaration of the consignor (Causes 7 and 8).

The goods and instructions are accepted and dealt with subject to the Standard Conditions printed overleaf.

Taken in charge in apparent good order and condition, unless otherwise noted herein, at the place of receipt for transport and delivery as mentioned above.

One of these Multimodal Transport Bills of Lading must be surrendered duly endorsed in exchange for the goods. In Witness whereof the original Multimodal Transport Bills of Lading all of this tenor and date have been signed in the number stated below, one of which being accomplished the other(s) to be void.

Freight amount	Freight payable at	Place and date of issue
	SYDNEY	SYDNEY 27/08/97
Cargo insurance through the undersigned ☐ not covered ☐ Covered according to attached Policy	Number of Original FBL's 0 (ZERO)	Stamp and signature
For delivery of goods please apply to: AIR SEA INT'L FORWARDING INC 1155 WEST CHESTNUT STREET SUITE 2-B UNION NEW JERSEY 07083 USA		

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BEST AVAILABLE COPY

66a

THE SHIPPING GROUP

OR PORT TO PORT SHIPMENT

SHIPPER / EXPORTER (COMPLETE NAME AND ADDRESS)
INTERNATIONAL CARGO CONTROL PTY LTD
1753 BOTANY ROAD
BANKSMEADOW NSW 2016
AUSTRALIA

BILL OF LADING NO: SUDU307000560273
BOOKING NO.
EXPORT REFERENCES: LLOYDS LIST CODE:7226275 3/13

CONSIGNEE (COMPLETE NAME & ADDRESS)
AIR SEA INT'L FORWARDING INC
1155 WEST CHESTNUT STREET
SUITE 2-B
UNION, NEW JERSEY 07083
U.S.A.

FORWARDING AGENT - REFERENCES

POINT AND COUNTRY OF ORIGIN

NOTIFY PARTY (COMPLETE NAME & ADDRESS)

DOMESTIC ROUTING &/OR EXPORT INSTRUCTIONS (ALSO NOTIFY

	PLACE OF RECEIPT	A CODE	D CODE
	SYDNEY TERMINAL		

VESSEL	VOYAGE	PORT OF LOADING	TYPE OF MOVE	ORIGINALS TO BE RELEASED AT
QUEENSLAND STAR	030N	SYDNEY	HOUSE HOUSE	SYDNEY

PORT OF DISCHARGE FROM VESSEL	PLACE OF DELIVERY	SHIPPER INFORMATION / NOT PART OF THIS BL CONTRACT
SAVANNAH GA	HUNTSVILLE AL	

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
CONTAINER SEAL-NUMBERS TARE SIZE TYPE TOLU4694977 24485573 2250 20 OT	1	CONTAINER - SAID TO CONTAIN 2 PIECES PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 70CMS O/HEIGHT	16630 KGS	41.000 M3
CONTAINER SEAL-NUMBERS TARE SIZE TYPE TOLU4692254 24485570 2250 20 OT	1	CONTAINER - SAID TO CONTAIN 2 PIECES PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 52CMS O/HEIGHT	19890 KGS	41.000 M3

COPY not negotiable

TOTAL NO OF PKGS	DECLARED VALUE	
10		IF A DECLARED VALUE IS ENTERED IT WILL BE VOID AND OF NO EFFECT UNLESS (1) A DECLARATION OF VALUE IS MADE IN WRITING PRIOR TO SHIPMENT AND (2) THE AD VALOREM RATE HAS BEEN PAID AT OR PRIOR TO TOTAL OF GOODS RECEIVED FOR SHIPMENT (SEE CLAUSE 17 ON REVERSE SIDE. IF CHECK 21 PAYMENT OF AD VALOREM RATE FAILS TO CLEAR FOR ANY REASON WHATSOEVER THIS BOX WILL BE VOID

FREIGHT CHARGES	RATE/TON	PER	RATE	PREPAID	COLLECT	CURRENCY / RATE OF EXCHANGE

NO. ORIG. B/L	TOTAL PREPAID	TOTAL COLLECT	FREIGHT PAYABLE AT
			SYDNEY

IN WITNESS WHEREOF the number of original Bills of Lading stated on the face hereof to this shipment have been signed, one of which being accomplished, the others to stand void

PAGE 1

APPLICABLE ONLY WHEN USED FOR MULTIMODAL OR THROUGH TRANSPORTATION

B/L CONTINUED ON PAGE 2

Tariff Item No. 842825

PLACE AND DATE OF ISSUE SYDNEY 27.08.9

COLUMBUS LINE AUSTRALIA, PTY. LTD.
A.C.N : 000 807 858

Signed for Columbus Line Australia Pty Ltd A.C.N. 000 807 858 as agent for the

Definitions
- «Freight Forwarder» means the Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier.
- «Merchant» means and includes the Shipper, the Consignor, the Consignee, the Holder of this FBL, the Receiver and the Owner of the Goods.
- «Consignor» means the person who concludes the multimodal transport contract with the Freight Forwarder.
- «Consignee» means the person entitled to receive the goods from the Freight Forwarder.
- «Taken in charge» means that the goods have been handed over to and accepted for carriage by the Freight Forwarder at the place of receipt evidenced in this FBL.
- «Goods» means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the Freight Forwarder, irrespective of whether such property is to be or is carried on or under deck.

1. Applicability
Notwithstanding the heading «FIATA Multimodal Transport Bill of Lading (FBL)» these conditions shall also apply if only one mode of transport is used.
2. Issuance of this FBL
2.1. By issuance of this FBL the Freight Forwarder
a) undertakes to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL;
b) assumes liability as set out in these conditions.
2.2. Subject to the conditions of this FBL, the Freight Forwarder shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or any other person of whose services he makes use for the performance of the contract evidenced by this FBL, as if such acts and omissions were his own.
3. Negotiability and title to the goods
3.1. This FBL is issued in a negotiable form unless it is marked «non negotiable». It shall constitute title to the goods and the holder, by endorsement of this FBL, shall be entitled to receive or to transfer the goods herein mentioned.
3.2. The information in this FBL shall be prima facie evidence of the taking in charge by the Freight Forwarder of the goods as described by such information unless a contrary indication, such as «shipper's weight, load and count», «shipper-packed container» or similar expressions, has been made in the printed text or superimposed on this FBL. However, proof to the contrary shall not be admissible when the FBL has been transferred to the consignee for valuable consideration who in good faith has relied and acted thereon.
4. Dangerous Goods and Indemnity
4.1. The Merchant shall comply with rules which are mandatory according to the national law or by reason of International Convention, relating to the carriage of goods of a dangerous nature, and shall in any case inform the Freight Forwarder in writing of the exact nature of the danger, before goods of a dangerous nature are taken in charge by the Freight Forwarder and indicate to him, if need be, the precautions to be taken.
4.2. If the Merchant fails to provide such information and the Freight Forwarder is unaware of the dangerous nature of the goods and the necessary precautions to be taken and if, at any time, they are deemed to be a hazard to life or property, they may at any place be unloaded, destroyed or rendered harmless, as circumstances may require, without compensation. The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability, or expense arising out of their being taken in charge, or their carriage, or of any service incidental thereto.
The burden of proving that the Freight Forwarder knew the exact nature of the danger constituted by the carriage of the said goods shall rest on the Merchant.
4.3. If any goods shall become a danger to life or property, they may in like manner be unloaded or landed at any place or destroyed or rendered harmless. If such danger was not caused by the fault and neglect of the Freight Forwarder he shall have no liability and the Merchant shall indemnify him against all loss, damage, liability and expense arising therefrom.
5. Description of Goods and Merchant's Packing and Inspection
5.1. The Consignor shall be deemed to have guaranteed to the Freight Forwarder the accuracy, at the time the goods were taken in charge by the Freight Forwarder, of all particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity and, if applicable, to the dangerous character of the goods, as furnished by him or on his behalf for insertion on the FBL.
The Consignor shall indemnify the Freight Forwarder against all loss, damage and expense resulting from any inaccuracy or inadequacy of such particulars.
The Consignor shall remain liable even if the FBL has been transferred by him.
The right of the Freight Forwarder to such an indemnity shall in no way limit his liability under this FBL to any person other than the Consignor.
5.2. The Freight Forwarder shall not be liable for any loss, damage or expense caused by defective or insufficient packing of goods or by inadequate loading or packing within containers or other transport units when such loading or packing has been performed by the Merchant or on his behalf by a person other than the Freight Forwarder, or by the defect or unsuitability of the containers or other transport units supplied by the Merchant, or in respect by the Freight Forwarder if a defect or unsuitability of the container or other transport unit would have been apparent upon reasonable inspection by the Merchant. The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability and expense so caused.
6. Freight Forwarder's Liability
6.1. The responsibility of the Freight Forwarder for the goods under these conditions covers the period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery.
6.2. The Freight Forwarder shall be liable for loss of or damage to the goods as well as for delay in delivery if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Clause 7.1., unless the Freight Forwarder proves that no fault or neglect of his own, his servants or agents or any other person referred to in Clause 2.2. has caused or contributed to such loss, damage or delay. However, the Freight Forwarder shall only be liable for loss following from delay in delivery if the Consignor has made a declaration of interest in timely delivery which has been accepted by the Freight Forwarder and stated in this FBL.
6.3. Arrival times are not guaranteed by the Freight Forwarder. However, delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which would be reasonable to require of a diligent Freight Forwarder, having regard to the circumstances of the case.
6.4. If the goods have not been delivered within ninety consecutive days following such date of delivery as determined in Clause 6.3., the claimant may, in the absence of evidence to the contrary, treat the goods as lost.
6.5. When the Freight Forwarder establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more causes or events specified in a – e of the present clause, it shall be presumed that it was so caused, always provided, however, that the claimant shall be entitled to prove that the loss or damage was not, in fact, caused wholly or partly by one or more of such causes or events:
a) an act or omission of the Merchant, or person other than the Freight Forwarder acting on behalf of the Merchant or from whom the Freight Forwarder took the goods in charge;
b) insufficiency or defective condition of the packaging or marks and/or numbers;
c) handling, loading, stowage or unloading of the goods by the Merchant or any person acting on behalf of the Merchant;
d) inherent vice of the goods;
e) strike, lockout, stoppage or restraint of labour.
6.6. Defences for carriage by sea or inland waterways
Notwithstanding Clauses 6.2., 6.3. and 6.4. the Freight Forwarder shall not be liable for loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by:
a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;
b) fire, unless caused by the actual fault or privity of the carrier, however, always provided that whenever loss or damage has resulted from unseaworthiness of the ship, the Freight Forwarder can prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage.
7. Paramount Clauses
7.1. These conditions shall only take effect to the extent that they are not contrary to the mandatory provisions of International Conventions or national law applicable to the contract evidenced by this FBL.
7.2. The Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading, dated Brussels 25th August 1924, or in those countries where there are already in force the Hague-Visby Rules contained in the Protocol of Brussels, dated 23rd February 1968, as enacted in the Country of Shipment, shall apply to all carriage of goods by sea and also to the carriage of goods by inland waterways, and such provisions shall apply to all goods whether carried on deck or under deck.
7.3. The Carriage of Goods by Sea Act of the United States of America (COGSA) shall apply to the carriage of goods by sea, whether on deck or under deck, if compulsorily applicable to this FBL or would be applicable but for the goods being carried on deck in accordance with a statement on this FBL.
8. Limitation of Freight Forwarder's Liability
8.1. Assessment of compensation for loss of or damage to the goods shall be made by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with this FBL, they should have been so delivered.
8.2. The value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there are no such prices, by reference to the normal value of goods of the same name and quality.

be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher, unless the nature and value of the goods shall have been declared by the Consignor and accepted by the Freight Forwarder before the goods have been taken in his charge, or the ad valorem freight rate paid, and such value is stated in the FBL by him, then such declared value shall be the limit.
8.4. Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the FBL as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.
8.5. Notwithstanding the above mentioned provisions, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the Freight Forwarder shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.
8.6. a) When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the Freight Forwarder's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.
b) Unless the nature and value of the goods shall have been declared by the Merchant and inserted in this FBL, and the ad valorem freight rate paid, the liability of the Freight Forwarder under COGSA, where applicable, shall not exceed US$ 500 per package or, in the case of goods not shipped in packages, per customary freight unit.
8.7. If the Freight Forwarder is liable in respect of loss following from delay in delivery, or consequential loss or damage other than loss of or damage to the goods, the liability of the Freight Forwarder shall be limited to an amount not exceeding the equivalent of twice the freight under the multimodal contract for the multimodal transport under this FBL.
8.8. The aggregate liability of Freight Forwarder shall not exceed the limits of liability for total loss of the goods.
8.9. The Freight Forwarder is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the Freight Forwarder done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.
9. Applicability to Actions in Tort
These conditions apply to all claims against the Freight Forwarder relating to the performance of the contract evidenced by this FBL, whether the claim be founded in contract or in tort.
10. Liability of Servants and other Persons
10.1. These conditions apply whenever claims relating to the performance of the contract evidenced by this FBL are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract, whether such claims are founded in contract or in tort, and the aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in clause 8.
10.2. In entering into this contract as evidenced by this FBL, the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract.
10.3. However, if it is proved that the loss of or such loss or damage to the goods resulted from a personal act or omission of such a person referred to in Clause 10.1., done with intent to cause damage, or recklessly and with knowledge that damage would probably result, such person shall not be entitled to benefit of limitation of liability provided for in Clause 8.
10.4. The aggregate of the amounts recoverable from the Freight Forwarder and the persons referred to in Clauses 2.2. and 10.1. shall not exceed the limits provided for in these conditions.
11. Method and Route of Transportation
Without notice to the Merchant, the Freight Forwarder has the liberty to carry the goods on or under deck and to choose or substitute the means, route and procedure to be followed in the handling, stowage, storage and transportation of the goods.
12. Delivery
12.1. Goods shall be deemed to be delivered when they have been handed over or placed at the disposal of the Consignee or his agent in accordance with this FBL, or when the goods have been handed over to any authority or other party to whom, pursuant to the law or regulation applicable at the place of delivery, the goods must be handed over, or such other place at which the Freight Forwarder is entitled to call upon the Merchant to take delivery.
12.2. The Freight Forwarder shall also be entitled to store the goods at the sole risk of the Merchant, and the Freight Forwarder's liability shall cease, and the cost of such storage shall be paid, upon demand, by the Merchant to the Freight Forwarder.
12.3. If at any time the carriage under this FBL is or is likely to be affected by any hindrance or risk of any kind (including the condition of the goods) not arising from any fault or neglect of the Freight Forwarder or a person referred to in Clause 2.2. and which cannot be avoided by the exercise of reasonable endeavours the Freight Forwarder may:
abandon the carriage of the goods under this FBL and, where reasonably possible, place the goods or any part of them at the Merchant's disposal at any place which the Freight Forwarder may deem safe and convenient, whereupon delivery shall be deemed to have been made, and the responsibility of the Freight Forwarder in respect of such goods shall cease.
In any event, the Freight Forwarder shall be entitled to full freight under this FBL and the Merchant shall pay any additional costs resulting from the above mentioned circumstances.
13. Freight and Charges
13.1. Freight shall be paid in cash, without any reduction or deferment on account of any claim, counterclaim or set-off, whether prepaid or payable at destination.
Freight shall be considered as earned by the Freight Forwarder at the moment when the goods have been taken in his charge, and not to be returned in any event.
13.2. Freight and all other amounts mentioned in this FBL are to be paid in the currency named in this FBL or, at the Freight Forwarder's option, in the currency of the country of dispatch or destination at the highest rate of exchange for bankers sight bills current for prepaid freight on the day of dispatch and for freight payable at destination on the day when the Merchant is notified on arrival of the goods there or on the date of withdrawal of the delivery order, whichever rate is the higher, or at the option of the Freight Forwarder on the date of this FBL.
13.3. All dues, taxes and charges or other expenses in connection with the goods shall be paid by the Merchant.
Where equipment is supplied by the Freight Forwarder, the Merchant shall pay all demurrage and charges which are not due to a fault or neglect of the Freight Forwarder.
13.4. The Merchant shall reimburse the Freight Forwarder in proportion to the amount of freight for any costs for deviation or delay or any other increase of costs of whatever nature caused by war, warlike operations, epidemics, strikes, government directions or force majeure.
13.5. The Merchant warrants the correctness of the declaration of contents, insurance, weight, measurements or value of the goods but the Freight Forwarder has the liberty to have the contents inspected and the weight, measurements or value verified. If on such inspection it is found that the declaration is not correct it is agreed that a sum equal either to five times the difference between the correct figure and the freight charged, or to double the correct freight less the freight charged, whichever sum is the smaller, shall be payable as liquidated damages to the Freight Forwarder for his inspection costs and losses of freight on other goods notwithstanding any other sum having been stated on this FBL as freight payable.
13.6. Despite the acceptance by the Freight Forwarder of instructions to collect freight, charges or other expenses from any other person in respect of the transport under this FBL, the Merchant shall remain responsible for such monies on receipt of evidence of demand and the absence of payment for whatever reason.
14. Lien
The Freight Forwarder shall have a lien on the goods and any documents relating thereto for any amount due at any time to the Freight Forwarder from the Merchant including storage fees and the cost of recovering same, and may enforce such lien in any reasonable manner which he may think fit.
15. General Average
The Merchant shall indemnify the Freight Forwarder in respect of any claims of a General Average nature which may be made on him and shall provide such security as may be required by the Freight Forwarder in this connection.
16. Notice
16.1. Unless notice of loss of or damage to the goods, specifying the general nature of such loss or damage, is given in writing by the consignee to the Freight Forwarder when the goods are delivered to the consignee in accordance with clause 12, such handing over is prima facie evidence of the delivery by the Freight Forwarder of the goods as described in this FBL.
16.2. Where the loss or damage is not apparent, the same prima facie effect shall apply if notice in writing is not given within 6 consecutive days after the day when the goods were delivered to the consignee in accordance with clause 12.
17. Time bar
The Freight Forwarder shall, unless otherwise expressly agreed, be discharged of all liability under these conditions unless suit is brought within 9 months after the delivery of the goods, or the date when the goods should have been delivered, or the date when in accordance with clause 6.4. failure to deliver the goods would give the consignee the right to treat the goods as lost.
18. Partial Invalidity
If any clause or a part thereof is held to be invalid, the validity of this FBL and the remaining clauses or a part thereof shall not be affected.
19. Jurisdiction and applicable law
Actions against the Freight Forwarder may be instituted only in the place where the Freight Forwarder has his place of business as stated on the reverse of this FBL and shall be decided according to the law of the country in which that place of business is situated.

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COLUMBUS

TERMS AND CONDITIONS

1. DEFINITIONS

(a) "Carrier" means Columbus Line, which is the trade name used by Hamburg Amerikanische Dampfschiffahrts-Gesellschaft Eggert & Amsinck, Ost-West-Service Hamburg, Germany, the Carrier named on the face side hereof, the vessel, her owner, operator, demise charterer, time charterer, voyage charterer, space or slot charterer, sub-carrier and substitute carrier, whether acting as Carrier or bailee.

(b) "Charges" means freights, dead freights, demurrage and all expenses and money obligations incurred and payable by the Merchant.

(c) "Container" means any container, van, trailer, flatbed, transportable tank, railroad car, platform, flat, pallet, skid, platform, crate, sling-load or any similar article of transport.

(d) "Goods" means the cargo received from the shipper and described on the face side hereof and any Container not supplied by or on behalf of the Carrier.

(e) "Merchant" means the shipper, consignee, receiver, holder of this Bill of Lading, owner of the cargo or person entitled to the possession of the cargo and the servants and agents of any of these, all of whom shall be jointly and severally liable to the Carrier for the payment of all Charges, and for the performance of the obligations of any of them under this Bill of Lading.

(f) "On Board" or similar words endorsed on this Bill of Lading mean that in a Port to Port shipment, the Goods have been loaded on board the Vessel or are in the custody of the relevant carrier; and in the event of intermodal transportation, if the originating carrier is the relevant carrier, means that the Goods have been loaded on board rail cars or another relevant conveyance at the Place of Receipt or are in the custody of a Participating carrier intermediate to the Port of Loading named on the reverse side.

(g) "Participating carrier/Lessee" means any other carrier by water, land or air, performing any part of the carriage, whether acting as sub-carrier, substitute carrier or bailee.

(h) "Vessel" means the ocean vessel named on the face side hereof, and any substitute, feeder, barge, or other means of conveyance by water used in whole or in part performance of the carriage.

2. CARRIER'S TARIFF

(a) Goods carried hereunder are subject to all terms and conditions of Carrier's applicable tariff, etc. filed with the Federal Maritime Commission, Interstate Commerce Commission or other regulatory body which governs a particular portion of the carriage hereunder, terms and conditions and liability incorporated herein as part of the Terms and Conditions of this Bill of Lading. Copies of relevant provisions of applicable tariff(s) are available from Carrier, Federal Maritime Commission, Interstate Commerce Commission or other regulatory body upon request. In the event of any conflict between the terms and provisions of such tariff(s) and the Terms and Conditions of this Bill of Lading, this Bill of Lading shall prevail.

3. PERFORMANCE; (I) APPLICABLE LEGISLATION

(a) Carrier shall not be responsible for the Goods from the time received at the Port of Loading (and subsequent for should have been delivered at the Port of Discharge and also during any previous or subsequent period of carriage performed under this Bill of Lading, except to the provisions of any legislation compulsorily applicable to this Bill of Lading (1) which is subject to the Hague Rules contained in the International Convention for the Unification of Certain Rules Relating to Bills of Lading, dated at Brussels, August 25, 1924, including subsequent themes, such as the Carriage of Goods by Sea Act of the United States (hereinafter "COGSA") or (2) which gives effect to the said Rules or amended by the Protocols to Amend the International Convention for the Unification of Certain Rules of Law Relating Into Bills of Lading, dated at Brussels, February 23, 1968 (the "Visby Amendments") and December 21, 1979 (the "SDR Protocol"), including, if compulsorily applicable, the Australian Carriage of Goods by Sea Act, 1991 or (3) where the Hague Rules, subsequent themes or Hague Visby Amendments (including the SDR Protocol) are not compulsorily applicable, this Bill of Lading shall take effect subject to any National law which may be in force at the Port of Loading or place of issue of the Bill of Lading making the United Nations Convention on the Carriage of Goods by Sea 1978 (the "Hamburg Rules") compulsorily applicable to this Bill of Lading, in which case this Bill of Lading shall (whatever which subject to the Hamburg Rules which shall nullify any stipulation derogating in any manner to the detriment of the Merchant. The applicable legislation shall govern during the Carrier's extra period of responsibility. In the absence of compulsorily applicable legislation, COGSA shall govern.

(b) The Carrier shall, notwithstanding which legislation is applicable under a) above, be entitled to the benefit of Sections 4281 through 4287 of the Revised Statutes of the United States and amendments thereto, as if the same were expressly set out herein.

(c) (i) The rights, defences, immunities, exemptions, limitations of and exonerations from liability of whatsoever nature, provided for in this Bill of Lading, or (as far as may be permissible) under statute, shall apply in any action or proceeding brought against the Carrier, whether in contract, tort or equity.

4. THROUGH TRANSPORTATION

(a) Where either Place of Receipt or Place of Delivery is not both herein and is an inland point (through transportation basis), Carrier will give one transportation between SRS intermodal and such inland points, which may well involve transport by rail and, notwithstanding anything herein contained, but always subject to Clause 3, hereof, Carrier shall be liable for loss or damage of whatsoever nature and however arising to the following extent, but no further:

(i) Upon proof that the loss or damage arose during a part of the carriage not subject to the Hague Rules legislation or Protocols amending said Rules, as set forth in Clause 3, hereof, said legislation shall apply; or

(ii) Upon proof that the loss or damage not falling within a) above but concerning which the law of any country, state or subdivision thereof contains compulsorily applicable provisions and would have applied if Merchant had made a separate and direct contract with Carrier or a Participating carrier relative to a particular stage of transport wherein the loss or damage occurred and received as evidence thereof a particular document required to be issued, then the liability of the Carrier and Participating carrier shall be subject to the provisions of such law.

(b) If it should be determined that Carrier bears any responsibility for loss or damage occurring during the custody of the Participating carrier and be subject to law compulsorily applicable to Participating carrier's contract of carriage, then Carrier shall be entitled to all rights, defences, immunities, exemptions, limitations of and exonerations from liability of whatsoever nature accorded under such Participating carrier's contract of carriage, tariff, and applicable law, provided however, that nothing contained herein shall be deemed a surrender by Carrier of any rights, defences and immunities or an increase of any of its exemptions, limitations of or exonerations from liability under this Bill of Lading, the Carrier's applicable tariff or laws applicable or relating thereto.

(c) Except where COGSA is compulsorily applicable or is made applicable by this Bill of Lading, Carrier's liability for loss of or damage to the Goods shall not in any event exceed U.S.DLRS. 2.50 per kilo of gross weight of the Goods lost or damaged.

5. SUB-CONTRACTING; BENEFICIARIES

(a) The Carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by it in relation to the Goods or Containers or other packages or any other goods.

(b) It is understood and agreed that if it should be adjudged that any person or entity other than or in addition to the Carrier is under any responsibility with respect to the Goods or any other goods, regardless of the port or place where any loss or damage shall occur and whether the Goods covered hereby or any other goods are being handled or are damaged directly or indirectly during any handling, and even if the Goods or other goods are transported on free in, stowed and/or free out terms, all exemptions, limitations, defences and exemptions from liability provided by law or by the terms and Conditions hereof shall be available to all agents, servants employees, representatives, all Participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, lashers and all subcontractors, carriage's wholesomer, in connection for the foregoing exemptions, limitations of and exemptions from liability the Carrier is acting as agent and trustee for and on behalf of said persons described above, all of whom shall to the extent be deemed to be a party to the contract evidenced by this Bill of Lading, regardless for whom acting or by whom employed and paid. It being always understood that said beneficiaries are not entitled to any greater or further exemptions, limitations of or exonerations from liability than those that the Carrier has under this Bill of Lading in any given situation.

(c) The Carrier undertakes to procure such services as necessary and shall have the right at its sole discretion to select any mode of load, sea or air transport and to arrange transhipment by other carriers to accomplish the total or any part of the carriage from Place of Receipt to Place of Delivery, except as may be otherwise provided herein.

(d) No agent or servant of the Carrier shall have power to waive or vary any of the terms hereof unless such waiver or variation is in writing and is specifically authorized or ratified by an officer or director of the Carrier having actual authority to bind the Carrier to such waiver or variation.

6. WARRANTY

(a) The Merchant warrants that in agreeing to the terms and Conditions hereof, he is, or has the authority of, the person owning or entitled to the possession of the Goods and this Bill of Lading.

7. OPTION OF INSPECTION

(a) The Carrier shall be entitled, but not obligated to open any Container at any time and to inspect contents, if it appears that the contents or any part thereof cannot safely or properly be carried or carried further, either at all or without incurring additional expense. Carrier may abandon the transportation and/or take any necessary steps and/or incur reasonable additional expenses to construe the carriage or store the Goods which shall be deemed to constitute due delivery hereunder. The Merchant shall indemnify the Carrier against any reasonable additional Charges so incurred, unless due solely to Carrier's fault.

(b) However, before taking any of the above steps, the Carrier shall, if feasible, make all reasonable attempts to notify all cargo interests identified in Bill of Lading, otherwise known to Carrier, to have any interest in Goods of its intention to take such steps.

8. DESCRIPTION OF GOODS; RESPONSIBILITY OF MERCHANT AND GOODS

(a) Neither Carrier, nor its agents and servants, shall be liable for, or precluded as to, correctness of any marks, descriptions or other representations furnished or made by or on behalf of Merchant or accessories on the Goods or the packages or Containers in which Goods are stuffed, stowed and carried, neither Container and Carrier does not represent quantity, weight, condition, quality or conformance of such concerns recorded in list of Lading to be accurate or binding, stowing and delivering to the proper.

(b) (1) The Terms and Conditions of this Bill of Lading shall govern Carrier's responsibility in connection with or arising out of the supply of a Container to Merchant, whether supplied before or after Goods are received by the Carrier or delivered to Merchant.

(2) If the Container has been stuffed by or on behalf of Merchant,

(A) Carrier shall not be liable for loss of or damage to the Goods;

(i) caused by manner in which Container had been stuffed;

(ii) caused by unsuitability of Goods for Container or Containers;

(iii) caused by unsuitability or defective condition of Container

provided that where Container has been supplied by or on behalf of the Carrier, this paragraph (a) shall only apply if the unsuitability or defective condition arose:

(i) without any want of due diligence on Carrier's part or

(ii) would have been apparent upon reasonable examination by Merchant at or prior to time Container was stuffed;

(iii) if Container is not sealed at commencement of Carriage except where Carrier has agreed to seal Container.

(B) Merchant shall indemnify, irrevocably and hold Carrier harmless against any loss, damage, claim, liability or expense whatsoever arising from one or more of matters mentioned in (A) above except for (A) (iii) (a).

(3) Where Carrier is instructed to provide a Container, in absence of a written request to contrary, Carrier is not under an obligation to provide a Container of particular type or quality.

(4) When a Container is to be stripped by or on behalf of the Merchant, Merchant shall promptly strip, or cause to be stripped, Container and take delivery of its contents, irrespective of condition of Goods. Further, Merchant shall be and remain liable for any loss, damage or expense of whatsoever nature arising or resulting from stripping howsoever occurring, including but not limited to loss or damage to the Goods, Container, Vessel or conveyance or to other Cargo, property or persons, whether such loss or damage is then evident or later manifests itself.

(c) When any Container utilized is owned or leased by Carrier, and used returned to Carrier's custody, Merchant shall be and remain liable, at tariff rates, for any extra demurrage time allowed for the use of such Container, and for any loss, damage or expenses incurred by Carrier as a result of failure to return the Container to Carrier in the same sound condition and state of cleanliness as when received by or on behalf of Merchant, even if a deviation caused by Goods does not then manifest itself and/or results in loss, damage or expense at a subsequent time.

(f) Merchant agrees to be responsible for all expenses of any nature incurred while the Goods and Containers are in the custody of Carrier or any Participating Carrier, their agents or servants, including but not limited to repairs, reconditioning, dismantling, detention, liens and taxes, civil or criminal, and whether charged to the Goods or Containers or levied upon Carrier, Vessel, other conveyance, Participating carrier, as consequence, their agents or servants, which result for the acts or omissions to act on part of Merchant, its agents or servants, or third-parties for whom Carrier, Participating carrier, their agents or servants, are not responsible, and to submit to jurisdiction of any court, tribunal or other body before whom Carrier may be brought.

(g) Carrier's prior written consent in writing required for dangerous or hazardous Goods, which must be distinctly marked as such on outside of Goods and container.

(h) Merchant warrants that it has complied with all Statutes, ordinances, regulations and requirements of Customs, Port and any other Authorities relative to the Goods, Containers, documentation and any other matters affecting or in any way relating thereto.

9. CONTAINERIZED CARGO

Goods may be stowed by Carrier in Containers, and Containers, whether stowed by Carrier or received fully stowed, may be carried on or under deck without notice, and Merchant expressly agrees that cargo stowed in a Container and carried on deck is considered for all legal purposes to be Cargo stowed under deck. Goods stowed in Containers on deck shall be subject to the legislation referred to in Clause 3, hereof and will contribute and/or receive compensation in General Average, as the case may be.

10. CONTAINERS WITH HEATING OR REEFER APPARATUS

Containers with temperature or atmosphere-controlled apparatus for heating, refrigeration or otherwise will not be furnished unless expressly contracted for in writing at time of booking and, when furnished, may entail extra and increased Charges. In absence of an express request, it shall be conclusively presumed that use of a dry container is appropriate for the Goods.

Merchants must provide Carrier with desired temperature range when delivering Containers to Carrier, and Carrier in exercise due diligence to maintain the temperature within a reasonable range while in its custody or control. The Carrier does not accept any responsibility for the functioning of temperature or atmosphere controlled Containers not owned or leased by Carrier or related companies.

11. DECK CARGO

Deck cargo (except that carried in Containers on deck) and live animals are accepted and carried solely at Merchant's risk (including, whether or not the result of unseaworthiness) and the Carrier will not in any event be liable for any loss or damage for or from which he is exempted, howsoever or occasioned by negligence, default or breach of contract of carriage, even if such loss or damage arises from unseaworthiness or due to the fault of the Carrier, any warranty of seaworthiness in the premises being hereby waived. Except as may be otherwise provided, such shipments shall be deemed Goods and shall be subject to all terms and Conditions of this Bill of Lading.

12. METHODS AND ROUTES OF TRANSPORTATION; LIBERTIES

Without derogating from the Carrier's obligation to carry the Goods to the Port of Discharge subject to these Terms and Conditions, with respect to the Goods or Containers or other packages, the Carrier may at any time and without notice to the Merchant:

(a) use any means of transport (sea, land and/or air) or storage whatsoever;

(b) transship or carry on another vessel or conveyance or by any other means of transport than that named on the reverse side hereof;

(c) carry Goods on or under deck at its option;

(d) proceed by any route at its sole and absolute discretion and whether the nearest, most direct, customary or advertised route or not or not at varying or local ports;

(e) proceed to or stay at any place whatsoever more or other than and or any ports of call on any part, whether scheduled or not;

(f) depart and/or store at any place whatsoever, at base or afloat, in the open or covered;

(g) proceed with or without pilots;

(h) carry livestock, contraband, explosives, munitions, warlike stores, dangerous or hazardous Goods or Goods of any and all kinds;

(i) deviate or stop at any unscheduled port for bunkers, repairs or for any purpose whatsoever;

(j) comply with any orders, directions or recommendations given by any government or authority or by any person or body acting or purporting to act with the authority of any government or authority or having under the terms of the insurance on the vessel or other conveyance employed by the Carrier the right to give such orders, directions or recommendations;

(k) take any other steps or perform any acts reasonable in the Carrier under the circumstances.

The liberties set out in subparagraphs a) through k) may be exercised by any purpose whatsoever even if not connected with the carriage covered by this Bill of Lading, and any action taken or omitted to be taken, and any delay arising therefrom, shall be deemed to be within the contractual and contemplated carriage and not be an unreasonable deviation.

In no circumstance whatsoever shall the Carrier be liable for direct, indirect or consequential loss or damage caused by delay.

13. DELIVERY

If delivery of the Goods or Containers or other packages or any part thereof is not taken by the Merchant when and where and at such time and place as the Carrier is entitled to, then the Merchant take delivery, they shall be conclusive to have been delivered to the Merchant, and the Carrier may, at its option, depart to its lien and without notice, elect to have same remain where they are or send to a warehouse or other place, wharf or depository, always at the risk and expense of the Merchant and Goods.

In South America and Caribbean areas that is, in those countries/territories where the Hamburg Rules are compulsorily applicable it is hereby agreed that the time for delivery of the goods shall be ten (10) months from the date of shipment.

14. CHARGES, INCLUDING FREIGHT

The Charges payable hereunder have been calculated on the basis of particulars furnished by or on behalf of the Merchant. The Carrier shall, at any time, be entitled to inspect, reweigh, remeasure or revalue the consignment and, if any of the particulars furnished by the Merchant are found to be incorrect, the Charges shall be adjusted accordingly, and the Merchant shall be responsible to pay the correct Charges and all expenses incurred by the Carrier in checking said particulars or any of them.

Charges shall be deemed earned on acceptance of the Goods or Containers or other packages for shipment by the Carrier and shall be paid by the Merchant in full, without any offset, counterclaim or deduction, when and/or wherever and in what currency and in what form, and shall be non-returnable in any event.

The Merchant shall remain responsible for all Charges, regardless whether the Bill of Lading be marked, or words of symbols, "Prepaid", "to be Prepaid" or "Collect".

In allowing for any deviation with respect to the Goods, the Carrier shall be entitled to the exclusive profit of the Merchant for all purposes, and any payment of Charges to other than the Carrier shall not, in any event, be considered payment to the Carrier.

The Merchant shall defend, indemnify and hold the Carrier, any Participating carrier, their agents and servants, harmless from and against all liability, loss, damage and expense which may be sustained by or incurred by the Carrier in connection therewith.

15. CARRIER'S LIEN

Carrier shall have a lien on Goods and any Charges and the proceeds in any manner for all sums due under this contract or any other contract or understanding to which Merchant (as defined herein) was party or otherwise involved, which lien shall also extend to General Average contributions, salvage and any and all necessary expenditures, advances or payments, and shall survive delivery. Such lien may be enforced by Carrier by public or private sale at any time and in any manner, without notice to Merchant. Carrier may apply proceeds of any sale to Merchant's account, holding any surplus subject to claims against it. Merchant shall remain liable for any deficiency. Carrier shall have a lien on any property of Merchant in its possession for any amount owing to Carrier from Merchant, whether or not relating to the Goods.

16. LOADING, DISCHARGING AND DELIVERY

Merchant shall load, stow, trim, lash, secure, dunnage, tally, count, discharge and take delivery of Goods and Containers within such reasonable time as the Carrier requires. Merchant shall pay all costs, charges and expenses incurred in connection therewith, including fines and penalties, and shall indemnify Carrier against any loss or damage to Goods or Containers or other packages or property caused by Merchant's breach of this obligation. Carrier shall have a lien on the Goods for all such costs, charges and expenses. Carrier may, but shall not be obliged to, load, stow, trim, lash, secure, dunnage, tally, count, discharge and take delivery of Goods and Containers or other packages and may employ agents and others for such purposes. Any costs incurred by Carrier shall be for the account of Merchant.

Any delay in loading, discharging or delivery caused by Merchant, or by reason of Goods being unready, or by reason of boycott or other labour difficulty of any kind, or by reason of any cause beyond Carrier's control, may at Carrier's option be treated by Carrier as a breach by Merchant for which Merchant shall be liable for all consequences thereof, including demurrage, and Carrier shall have a lien on the Goods for all such costs, charges and expenses. Carrier may, but shall not be obliged to, load, stow, trim, lash, secure, dunnage, tally, count, discharge and take delivery of Goods and Containers or other packages and may employ agents and others for such purposes. Any costs incurred by Carrier shall be for the account of Merchant.

Any delay in loading, discharging or delivery caused by Merchant, or by reason of Goods being unready, or by reason of boycott or other labour difficulty of any kind, or by reason of any cause beyond Carrier's control, may at Carrier's option be treated by Carrier as a breach by Merchant for which Merchant shall be liable for all consequences thereof, including demurrage, and Carrier shall have a lien on the Goods for all such costs, charges and expenses. Carrier may, but shall not be obliged to, load, stow, trim, lash, secure, dunnage, tally, count, discharge and take delivery of Goods and Containers or other packages and may employ agents and others for such purposes. Any costs incurred by Carrier shall be for the account of Merchant.

(a) If Goods are not taken delivery of by Merchant within the time provided for in Clause 13 hereof, or if Merchant fails to pay Charges, or if Merchant is in breach of any of its obligations hereunder, Carrier may, at its option, and without notice to Merchant, unless required by mandatory law, and without prejudice to any other rights Carrier may have, sell Goods by public or private sale, at any time and in any manner, without notice to Merchant. Carrier may apply proceeds of any sale to Merchant's account, holding any surplus subject to claims against it. Merchant shall remain liable for any deficiency. Carrier shall have a lien on any property of Merchant in its possession for any amount owing to Carrier from Merchant, whether or not relating to the Goods.

17. LIMITATION OF LIABILITY

Except as otherwise provided in this Clause and except as provided under any compulsorily applicable law including if mandatorily applicable, the Australian Carriage of Goods by Sea Act 1991, the Carrier's liability shall be limited to U.S. $500 limited money per package or per customary freight unit unless the nature of the cargo and valuation higher than $500 per package or per customary freight unit shall have been declared by Merchant before shipment and inserted in Bill of Lading, and extra freight paid if required. In such case, if the limitation amount shall exceed declared value, Carrier's liability, if any, shall not exceed declared value.

As to cargo shipped in bulk, the limitation applicable shall be that provided in Section 1304(5) of COGSA, or such other legislation, convention or law as may be applicable to no event shall any liability hereon be construed as a waiver of limitation as to cargo shipped in bulk.

If, on the reverse side hereof, the parties characterize the Container as a package or a lump sum freight is assessed, in either event, liability shall be limited to U.S. $ 500 per Container even if furnished by the Carrier. Notwithstanding the characterization on the reverse side hereof, where a Container is not furnished and/or stuffed by Carrier, each Container shall conclusively be counted a single package and Carrier's liability limited to $500. In the event this provision is held invalid during a period when compulsory legislation shall apply, it shall nevertheless apply during all non-compulsory periods such as, but not limited to, prior to loading and subsequent to discharge from Vessel.

All documents with exception of bona fide bookings shall be issued when Carrier or agent at its principal Agent's office of Carrier in either the country of loading or country of discharge of the Goods.

19. FIRE

Neither the Carrier nor any corporation owned by, subsidiary to or associated or affiliated with Carrier shall be liable in contract for or wholly spent any loss or damage to Goods or Containers or other packages occasioned by any fault, and even though before loading on or after discharge from the Vessel or other Conveyance, by reason of or by means of any law whatsoever, unless Carrier by act, contract damage or neglect, or by act actual fault or privity to any case wherein any exemption is not permitted by law, and no other defences afforded by this Bill of Lading and/or applicable legislation or convention would consecrate Carrier from liability. Carrier shall not be liable for loss or damage by fire unless shown to have been caused by Carrier's negligence.

20. BOTH TO BLAME COLLISION CAUSE

If the Vessel comes into collision with another vessel or object as a result of the fault or negligence of the other vessel or object or any act, neglect or default of the Carrier, Master, crew, pilot, agents or servants of the Carrier in the navigation or in the management of the Vessel, Merchant will indemnify Carrier against all loss or liability to the other or non-carrying vessel or her owners insofar as it represents any loss, damage or claim whatsoever by, of or to the Merchant, paid or payable by the other or non-carrying vessel or her owners to the Merchant and set-off, recouped or recovered by the other or non-carrying vessel or her owners as part of their claim against the carrying Vessel or Carrier.

The foregoing provisions shall also apply where the owners, operators of those in charge of any vessel or vessels or object other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision, contact, stranding or other accident.

This provision to remain in effect in other jurisdictions even if unenforceable or illegal in United States courts.

21. GENERAL AVERAGE

General Average shall be adjusted, stated and settled according to York-Antwerp Rules 1974, as amended, at any place at option of Carrier whether declared by Carrier or any person or vessel (other than the merchants), in the event of accident, danger, damage or disaster, before or after commencement of voyage, from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible by statute, contract or otherwise. Merchant shall contribute with Carrier in General Average to payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred. Merchant shall give such cash deposit or other security as Carrier may deem sufficient to cover estimated General Average contribution before delivery of the Carrier requires, or, if Carrier does not so require, within three months of delivery of Goods, whether or not at time of delivery Merchant had notice of Carrier's lien. Carrier shall be under no obligation to exercise any lien for General Average contribution due Merchant. If a salving ship is owned or operated by Carrier, salvage shall be paid for as fully and in same manner as if such salving ship was owned or operated by strangers. Carrier's obligation to General Average shall be paid even when such Average is result of fault, neglect or error of the Master, pilot, officers or crew Merchant expressly renounces any and all duties, defences, liens or responsibilities which might otherwise apply or arise as applicable law pursuant.

22. JURISDICTION

Any suit to enforce any claim for loss or damage in the Goods carried hereunder or to any other breach as referred to in Clause 3, hereof, shall be brought only in the Court by which the Goods are to enjoy the benefit of this Contract. Carrier may, however, at its option and in its sole discretion, elect to bring suit against Merchant in any court of competent jurisdiction at the place of delivery or the port of loading or the port of discharge of the Goods or at any other place designated in this Bill of Lading. Merchant shall submit to the jurisdiction of such court.

In the United States - at New York at S. District Court, Southern District of New York
In Canada - at Montreal in Prov. Province - at Auckland in Australia - at Sydney

Alternatively, if all parties agree, the claim may be referred to arbitration at a place to be agreed upon by the parties.

23. NON-WAIVER AND SEPARABILITY

No failure on the part of Carrier to exercise, and no delay in exercising, any right, power or remedy under this Bill of Lading shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or remedy preclude any other or further exercise thereof or the exercise of any other right, power or remedy. The rights and remedies provided for in this Bill of Lading are cumulative and not exclusive of any rights or remedies provided by law. If any provision of this Bill of Lading is held invalid or unenforceable by a court of competent jurisdiction, such provision shall be deemed modified to the extent necessary to render it valid and enforceable, or if it cannot be so modified, it shall be deemed deleted from this Bill of Lading, and the validity and enforceability of the remaining provisions of this Bill of Lading shall not be affected thereby.

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